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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 486

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, KENNETH POTTER, PETER E. MITCHELL AND VERNE SCOGGINS, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of California in this cause.

Opinions Below

The opinion of the Supreme Court of the State of California is reported in 41 A. C. 362 and is reproduced as

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Appendix A to this statement. The original opinion and order rendered herein by the Public Utilities Commission of the State of California[1] (identified as its Decision No. 47161) are reported at 51 Cal. P.U.C. 711 and are reproduced as Appendix B. The Commission's opinion and order denying rehearing (identified as its Decision No. 47276) are not reported; a copy thereof is reproduced as Appendix C.

Jurisdiction

The final judgment of the Supreme Court of California in this cause was entered on August 14, 1953. A petition for rehearing was filed on August 28, 1953, and an order denying that petition was entered on September 10, 1953. A petition for appeal was presented to Associate Justice William O. Douglas of the United States Supreme Court on October 21, 1953. The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by Title 28, United States Code, Section 1257(2).

The State action, the validity of which is sought to be determined by this appeal, is contained in the decisions of the Commission above referred to, which, among other things, direct and require[2] appellant to operate a particular local passenger train between Oakland Pier and Sacramento, California, and to use self-propelled rather than non-self-propelled cars on that train. This Court has held that "Such an order, being legislative in nature and made by an instrumentality of the State, is a State law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction."

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[1] Hereinafter generally referred to as "the Commission".

[2] This direction and requirement was by a three-member majority of the five-member Commission, with two members filing written dissents which are reproduced as a part of Decision No. 47161 in Appendix B. Those dissents were directed to the portions of the Commission decisions involved in this appeal.

Lake Erie & Western R. Co. v. *Pub. Util. Commn.* (1919), 249 U.S. 422, 424; *Live Oak Water Users Assn.* v. *Railroad Commn. of California* (1926), U.S. 354, 356; *Hamilton* v. *Regents* (1934), 293 U.S. 245, 258.

The Federal Questions Presented and the Manner in Which They Were Raised

The essential questions presented in this appeal are whether, in the light of the Commerce Clause of, and the Due Process Clause of the Fourteenth Amendment to, the Constitution of the United States, a state regulatory tribunal purporting to act under authority of a state law may validly (1) deny appellant, an interstate and intrastate carrier of freight and passengers by railroad, authority to discontinue a particular passenger train which is being operated at a substantial out-of-pocket loss and for which there is no present or prospective public need and (2) order appellant to use self-propelled cars rather than non-self-propelled cars on that train when the substitution of self-propelled cars would required a capital expenditure of approximately $150,000 per car, the operation of the train with that equipment would still result in a substantial out-of-pocket loss, and there is no public need for such substitution of equipment. Another essential question presented in this appeal is whether a state statutory judicial review procedure, construed to deprive a court reviewing such Commission action of all power to weigh independently the evidence on a factual question upon which its constitutionality hinges, is invalid under the Due Process Clause of the Fourteenth Amendment.[3]

The Supreme Court of California is the highest court in that State and the only court thereof having jurisdiction

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[3] All the points raised in the Assignment of Errors are also presented. The questions presented above set forth the major issues.

to review decisions of the Commission. The federal questions raised in this appeal have been raised[4] and urged at the following stages of the proceeding in which the Supreme Court of California entered the judgment from which this appeal is taken, viz., in the petition for writ of review and memorandum of points and authorities filed with the California Supreme Court, in the reply to the answer of the Commission to said petition for writ of review filed with that court, at the oral argument held before that court, in the reply to the supplemental points and authorities of the Commission filed with that court, and in the petition for rehearing filed with that court. The court's final action consisted of the opinion reproduced as Appendix A, with one justice filing a dissenting opinion which is annexed thereto. A petition by appellant for rehearing was denied by the court, with two of the justices dissenting.

Statutes Involved

The statutes involved, as that term has been defined by this Court, consist of Decision No. 47161 of the Public Utilities Commission of the State of California, entered in this cause on May 13, 1952, (Appendix B), and its Decision No. 47276 denying rehearing, entered herein on June 17, 1952, (Appendix C) (which decisions were issued by the Commission pursuant to powers delegated by the Legislature of the State of California in Sections 730, 761, 762 and 763 of the California Public Utilities Code), and also Sections 1756, 1757, 1759 and 1760 of the California Public Utilities Code.

Statement

Appellant, Southern Pacific Company, is an interstate common carrier of freight and passengers by railroad. The

[4] Appellant's contention that the Commission's orders are invalid because in conflict with the provisions of the United States Constitution were set out in full in Part IV of its petition for writ of review (pp. 10-11).

lines which comprise its system are located in eight of the western and southwestern states; extending in general from New Orleans, Louisiana, across Texas, New Mexico and Arizona, to Los Angeles, California, and thence by two main routes to the northern California cities of San Francisco, Oakland and Sacramento, and thence to Portland, Oregon; and including also a line extending from Oakland to Sacramento and thence across Nevada to Ogden, Utah. The total road mileage of the system is more than 12,400.

Appellant provides passenger service between Sacramento and San Francisco and intermediate points by train between Sacramento and Oakland Pier (a distance of 88 miles) and ferry vessel across San Francisco Bay between Oakland Pier and San Francisco (a distance of 4 miles). Appellant's passenger train service between Oakland Pier and Sacramento and intermediate points consists of 14 daily trains in each direction, eight of which operate the entire distance between Oakland Pier and Sacramento.

Since the completion in 1936 of the San Francisco Bay Bridge, which carries automobiles and buses, but not appellant's trains, between San Francisco and Oakland, and the development of the excellent highways between Oakland and Sacramento, the patronage of appellant's passenger service between San Francisco and Sacramento has steadily and substantially declined. That patronage has been lost largely to the motor-bus and the private automobile, both of which offer transportation between the two cities which not only is faster than that of appellant but involves no change of conveyance. In 1950 the lack of patronage had become so great that appellant suffered an annual out-of-pocket loss of some $300,000[5] from its local Sacramento-

[5] Out-of-pocket losses, as so used, include direct labor, and fuel and material costs, but exclude all indirect costs, such as supervision, overhead, taxes (other than payroll taxes), and return on investment.

San Francisco passenger service. Over $100,000 of this out-of-pocket loss was incurred directly as a result of the operation of the one midday local passenger train here concerned, operated daily, including Sundays, in each direction between Oakland Pier and Sacramento. An application for authority to discontinue that train was filed with the Commission by appellant on April 15, 1950. This application was consolidated for hearing with an investigation, instituted by the Commission on its own motion, respecting the sufficiency of appellant's passenger train service between San Francisco, Sacramento and Los Angeles and intermediate points. After such consolidated hearing had been held before Commissioner Justus F. Craemer, the Commission issued its Decision No. 47161 on May 13, 1952, by a vote of 3 to 2, dissenting opinions being filed by presiding Commissioner Craemer and Commissioner Kenneth Potter. The portions of that decision here in issue (1) deny appellant authority to discontinue the service provided by the train and (2) require appellant to use self-propelled railroad cars rather than non-self-propelled railroad cars on that train.

The majority of the Commission ordered this action by appellant notwithstanding the fact that the record made before the Commission contained no legitimate evidence of public need for the continuation of the train and not a scintilla of evidence of any public need for the use of self-propelled cars rather than non-self-propelled cars.

Moreover, the majority of the Commission ordered the use of self-propelled cars on the train in spite of the fact that appellant owned no self-propelled cars and did not use self-propelled cars on any of its trains between Oakland Pier and Sacramento or, for that matter, any place on its entire system. While appellant has, since the end of World War II, purchased 189 new lightweight streamlined cars and 80 new diesel locomotive units exclusively

for its passenger service, it has not found self-propelled cars suited to its particular passenger equipment requirements. Therefore, the effect of the Commission's decision is to require appellant to make a substantial capital investment ($150,000 per car) in such equipment for use on this one train, operating for a distance of only 88 miles in each direction. And even after this substantial investment, the Commission expressly found that appellant will still experience a substantial net annual loss in operating the train with self-propelled cars.

Upon denial by the Commission of appellant's application for rehearing (Decision No. 47276), appellant, following the state-court review course, consistent with *Alabama P. S. Commn.* v. *Southern R. Co.* (1951), 341 U. S. 341, sought and obtained a writ of review in the Supreme Court of California. After written and oral argument, the California Supreme Court, on August 14, 1953, issued its opinion affirming the portions of the Commission decision to which this appeal is directed, with Justice Douglas L. Edmonds filing a dissenting opinion. A petition for rehearing was denied by the court on September 10, 1953, with Justice Edmonds and also Justice B. Rey Schauer dissenting.

The Questions Presented Are Substantial

1. *The importance of this case*

This case is, of course, important because its issues arise under the Constitution of the United States and have a substantial financial impact upon appellant. It is also important because those issues involve one of the most serious problems today confronting the American railroads. That problem consists of the tremendous financial burden which the rendering of unpatronized and unneeded passenger service at a substantial deficit imposes on the railroad industry. A report on this subject, adopted No-

vember 11, 1952, by the National Association of Railroad and Utilities Commissioners, states:

> "The large and continuing deficits incurred by the railroads from the operation of passenger train service constitute the railroad industry's most serious problem today—a problem which is of paramount importance to the members of this Association and to the general public. Railroad earnings are being adversely affected, the users of freight service are already being forced to bear some of the burden of passenger losses, and if the trend toward increasing passenger deficits is continued unabated, the ability of the railroads as a privately-owned industry to continue providing necessary freight and passenger service to the public, either under normal conditions or in times of emergency, will be seriously jeopardized."[6]

And a report on the same subject, adopted September 23, 1953, by that association, states:

> "The passenger deficit reported by Class I railroads for the year 1952 was $643,000,000.
>
> This represents a reduction of 5.7 per cent from the record deficit reported in 1951, and can be considered as only token progress toward the solution of this desperately serious problem. Even the reduced deficit for 1952 was equivalent to 37.5 per cent of all net railway operating income earned from freight service. It is virtually impossible to over-emphasize the importance of the passenger deficit problem. Not only are railroad earnings affected, but the economic soundness of the railroad industry itself is impaired. * * *
>
> Another disappointing development has been the extremely slow progress made in eliminating the obviously hopeless deficit passenger trains. The railroads do not appear to have been sufficiently aggressive in this respect; and Commission handling of train-

[6] "Report of the Special Committee on Cooperation with the I.C.C. in the Study of the Railroad Passenger Deficit Problem", National Association of Railroad and Utilities Commissioners (1952), p. 50.

off applications has in many instances been extremely slow."[7]

The seriousness of the problem has also been recognized by the Interstate Commerce Commission in each of its last four annual reports:

"Another source of difficulty * * * is passenger-train service. The problem here lies not only in passenger service itself but also in allied services. Abandonments of unprofitable train services or the substitution of motor services are steps in the right direction. Where the public does not require rail passenger service or as much rail service as is being rendered, the need for stopping the loss is self-evident." (63rd Annual Report, Nov. 1, 1949, pp. 4-5.)

"The aggregate deficit from passenger train operations, computed by our staff on the basis of the formula we have prescribed, was $649 millions (preliminary) in 1949. * * * The heavy drain so placed on freight revenues has caused us continued and increasing concern during the year. * * * The need for the abandonment of unpatronized and unprofitable services was discussed in our last report. While some additional withdrawals of passenger service have been permitted during the year by the controlling public authorities, the need for further examination of what can be done in this direction in the interest of the railroads and of shippers remains important." (64th Annual Report, Nov. 1, 1950, p. 5.)

"The net effect on the passenger-train service deficit of a number of new factors in the current year cannot be estimated at this time, but the substantial deficit which will be incurred in 1951 calls for efforts on the part of all concerned to find means of amelioration." (65th Annual Report, Nov. 1, 1951, p. 43.)

"This passenger deficit constitutes a burden which

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[7] "Report of the Special Committee on Cooperation with the I.C.C. in the Study of the Railroad Passenger Deficit Problem", National Association of Railroad and Utilities Commissioners (1953), pp. 24-25.

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falls almost entirely on the carload freight traffic. * * *

"It would appear * * * that curtailment of unprofitable train operations of a local nature offers one of the means of reducing the passenger deficit." (66th Annual Report, Nov. 1, 1952, pp. 44-45.)

This concern of the regulatory bodies charged with the responsibility for the financial well-being of the rail carriers was recognized by the late Chief Justice Vinson, speaking for the Court in *Alabama P. S. Commn.* v. *Southern R. Co., supra*, 341 U. S. 341, 346 (decided on a procedural point):

"State and federal regulatory agencies have expressed concern over the chronic deficit arising out of passenger train operations as a threat to the financial security of the American railroads and have recommended drastic action to minimize the deficit, including the discontinuance of unpatronized and unprofitable service."

2. *The revolution in passenger transportation which has occurred as calling for a review by this Court at this time of State action requiring operation of money-losing passenger trains*

It has been more than thirty years since this Court last considered the propriety of state action requiring the operation of money-losing railroad passenger trains.[8] Decisions of this Court of thirty years or more ago, respecting that subject, occurred in an era when the railroad passenger train provided the sole practical means of most intercity transportation, and even those decisions dealt with facts differing from those presented here. During the last thirty

[8] *Atlantic Coast Line R. Co.* v. *N. Car. Corp. Commn.* (1907), 206 U.S. 1; *Missouri Pac. R. Co.* v. *Kansas* (1910), 216 U.S. 262; *Chesapeake & O. Ry. Co.* v. *Pub. Serv. Commn.* (1917), 242 U.S. 603. This Court's 1951 decision in *Alabama P.S. Commn.* v. *Southern R. Co., supra*, 341 U.S. 341, did not go to the merits of such state action, but went only to the propriety of federal district court review of such action.

ears, however, a tremendous revolution in passenger ransportation has occurred as a result of the amazing ncrease in the use of the private automobile and motor-bus ommon carriers, the construction of modern high-speed ighways, and the development of air-line carriers. More pecifically, with respect to intercity trips of 100 miles or ess, the present needs of the public are today fully met y the common-carrier bus lines and the private automo- ile—as a matter of fact, their greater flexibility provides service more attractive generally to the public than the ailroads can possibly furnish.

These facts have received the following judicial recog- nition:

"On short trips, say up to 200 miles, a very small per cent of those who travel use the train. The primary reason for this is good roads, good cars and a schedule of one's own making."

Texas & N. O. R. Co. v. *Railroad Commn.* (Tex. C. A., 1949), 220 S. W. 2d 273, 276.

"In former times the railroad was the chief means tionary change has taken place in the field of passenger transportation. Travel by air, water, buses, and by privately owned automobiles has largely brought about the change. The railroads no longer have a monopoly on transporting passengers. The local railroad passenger travel largely has been transferred from the railroads to the highways, and this competition has, to a great extent, caused the loss to local passenger business."

Fleming v. *Commonwealth* (1950), 191 Va. 288, 61 S. E. 2d 1, 4-5.[9]

"In former times the railroads was the chief means of transportation. The horse and buggy provided little if any competition. The traveling public depended

[9] Quoted with approval in *Chicago & N.W. Ry. Co.* v. *Michigan Pub. Serv. Commn.* (1951), 329 Mich. 432, 45 N.W. 2d 520, 528.

> almost entirely upon train service. * * * The conditions which required the railroads to perform these services exclusively no longer exist. The development of the public highway system and the common use of the automobile have materially changed the problem of passenger transportation. The establishment of schedule-operated bus lines, themselves common carriers, has proven more convenient to the traveling public."
>
> *Chicago, B. & Q. R. Co.* v. *Nebraska State Ry. Commn.* (1950), 152 Neb. 367, 41 N. W. 2d 165, 168.

See, also, the observation in 1935 by Mr. Justice Brandeis respecting the changed traveling habits of the public induced by the development of the automobile and improved highways, in *Nashville, C. & St. L. Ry.* v. *Walters* (1935), 294 U. S. 405, 421 *et seq.*

More recent reference to the automobile revolution and its effect upon the railroad passenger business appears in *King* v. *United States* (1952), 344 U. S. 254, 262, where Mr. Justice Burton, speaking for the Court, referred to the "steadily increasing passenger operating costs, together with the growth of vigorous competition from automobiles and other forms of transportation" and to the fact that "The ratio between passenger operating expense and revenue has varied in different areas but has been uniformly unfavorable to the railroads."

As a result of this transportation revolution the courts have had occasion to say that

> "Public service commissions and courts cannot shut their eyes to the changed conditions when considering public convenience and necessity and adequate public service facilities and conveniences that are reasonable and just."
>
> *Fleming* v. *Commonwealth, supra,* 191 Va. 288, 61 S. E. 2d 1, 5.

nd:

"• • • the rules announced in older legal precedents established prior to the transportation revolution wrought by public highways, private automobiles, certificated bus and common-carrier trucks • • • are no longer applicable • • •."

Application of Chicago, B. & Q. R. Co. (Chicago B. & Q. R. Co. v. *Municipalities of Holdrege)* (1950), 152 Neb. 352, 41 N. W. 2d 157, 164.

See, also:

Illinois Cent. R. Co. v. *Illinois Com. Commn.* (1951), 410 Ill. 77, 101 N. E. 2d 588, 593.

Accordingly, state appellate courts and federal district courts have not considered themselves bound by, and have expressly distinguished,[10] the previous decisions of this Court of thirty years or more ago, that a rail carrier could be compelled to operate a passenger train at a loss, where its system as a whole was operated at a profit. Almost uniformly, the recent state and federal district court decisions, on one ground or another, have overturned orders of public service commissions which required railroads, even with profitable system operations, to continue to operate unneeded passenger trains at a financial loss.[11]

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[10] In *Atlantic Coast Line R. Co.* v. *Pub. Serv. Commn.* (D.C.E.D., S.C., 1948), 77 F. Supp. 675, 685, these cases were distinguished on the ground that they dealt with the absolute duties of a carrier, such as those expressly thrust upon it by its franchise or charter, rather than with relative duties of service. The only such case cited in the opinion of the California Supreme Court, *Chesapeake & O. Ry. Co.* v. *Pub. Serv. Commn.* (1917), 242 U.S. 603, is distinguishable on the ground that the carrier was bound by a franchise obligation to render the passenger service there in issue. No franchise or other contractual provision requires appellant to operate the train concerned between Oakland Pier and Sacramento. The other earlier decisions of this Court are also distinguishable from the present case either on such ground, or on the ground that there was strong evidence of public need for the particular service, or because they preceded the adoption of the National Transportation Policy by Congress, *infra*.

[11] These decisions will be cited at various points below in this statement.

Consequently, it is appropriate that this Court itself re-examine the philosophy reflected in its thirty-year-old decisions, even though, as the other courts have recognized, they are not controlling in a situation such as this where there is no evidence of public need.

3. *The lack of public need for either the continuation of the train or the use of self-propelled, rather than non-self-propelled, equipment*

The lack of any public need for either the continuation of the train or the use of self-propelled, rather than non-self-propelled, equipment is the keystone of appellant's contentions that the Commission's action constitutes an undue burden on interstate commerce and deprives appellant of its property without due process of law.[12]

While the record made before the Commission is extensive, there is no conflict in the evidentiary facts there presented. Thus, the only evidentiary question requiring determination is whether those facts establish a public need either for the continuation of the train or for the use of self-propelled, rather than non-self-propelled, equipment. Even though that determination be considered one of fact, it calls for the exercise of an independent review by this Court, which is not bound by the findings and conclusions of the State court or the Commission. *Oyama* v. *California* (1948), 332 U. S. 633, 636, and cases cited; *Niemotko* v. *Maryland* (1951), 340 U. S. 268, 271; *Southern Pac. Co.* v. *Arizona* (1945), 325 U. S. 761, 771. See, also, *Watts* v. *Indiana* (1949), 338 U. S. 49, 51-52.

In our reference to the evidence, which follows, we consider separately the public need for the continuance of the

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[12] In *Alabama P.S. Commn.* v. *Southern R. Co.*, *supra*, 341 U.S. 341, 347, this Court said that constitutional issues in train abandonment cases "depend * * * upon the predominantly local factor of public need for the service rendered."

train and the public need for the use of self-propelled, rather than non-self-propelled, equipment.

A. *The lack of public need for the continuation of the train*

The evidence, without question, affirmatively shows that if the train were discontinued there would still be available other, completely adequate public transportation facilities by rail, bus and air and that there is relatively little use made by the public of the train. These factors, together with the element of the losses sustained in operating the particular passenger train, are the usually accepted criteria of public need therefor. *Illinois Cent. R. Co.* v. *Illinois Com. Commn., supra*, 410 Ill. 77, 101 N. E. 2d 588.

After discontinuance of the train, appellant would still operate thirteen daily passenger trains in each direction between Oakland Pier and Sacramento and between Oakland Pier and intermediate points (Davis or Martinez), seven operating the entire distance between Oakland Pier and Sacramento. In addition, the public would still have available between San Francisco and Sacramento daily train service by Western Pacific Railroad Company, 32 bus schedules each way (seven of which are nonstop between San Francisco and Sacramento) by Pacific Greyhound Lines, four bus schedules each way by Burlington Transportation Company, seven flights each way by United Air Lines, and three flights each way by Southwest Airways (Ex. 14, p. 5).[13]

The bus service of Pacific Greyhound Lines, standing alone, provides fully adequate transportation service. Those schedules are well distributed throughout the 24-hour day, there being departures practically every hour

[13] Exhibit and transcript references "Ex." and "T." are to the record made before the Commission.

from 6:00 a. m. to 6:00 p. m. The seven nonstop schedules of Pacific Greyhound Lines between San Francisco and Sacramento consume only 2 hours and 5 minutes, and the other schedules range from 2 hours and 15 minutes to 3 hours and 15 minutes (Ex. 6, p. 12). In comparison, the westbound train concerned provides on week-days a service of 2 hours and 50 minutes from Sacramento to San Francisco (Ex. 6, p. 12).

Acceptance by the public of bus service between San Francisco and Sacramento is reflected by the fact that in November 1950 appellant sold only some 5000 tickets between those cities for transportation on all of its trains, whereas Pacific Greyhound Lines during that same month sold approximately 14,000 tickets (Ex. 6, p. 9).

With respect to highway facilities and private automobile use between San Francisco and Sacramento, studies made by the staff of the Commission, received in evidence by the Commission, contain the following statements (Ex. 6, pp. 24-26):

> "The Southern Pacific service is paralleled between San Francisco and Sacramento by an excellent highway, U. S. Route 40. At the present time, the highway distance from downtown San Francisco to downtown Sacramento, is approximately 87 miles which is some 5 miles less than the railway distance. Recently a test run was made by the engineers of the Commission who drove from Sixth and Harrison Streets in San Francisco to downtown Sacramento in one hour fifty-nine minutes. Care was taken to travel at the prevailing speed on the highway. However, many motorists make the trip in approximately one hour forty-five minutes, particularly during hours of light traffic."
>
> "The highway is of at least four lane construction over almost its entire length."
>
> "This highway has been progressively improved during the past years so that today it is easier and faster to drive than it was at the close of the war in

1945, in spite of the increasing volume of automobile traffic."

"All of the improvements in the highway have had a most important effect on the rail patronage between these two points. A person can at the present time drive his car from one city to the other in shorter time than the train takes. Furthermore, he has the use of his automobile at the other end of his trip and is not dependent upon taxicabs and busses which would be the case if he took the train. It is our belief that the improvements in the highway and the corresponding increase in the utility of the private automobile has been a most important factor in the decline in rail patronage between the two cities."

The Commission staff studies also state that some 80 per cent of the total persons traveling between San Francisco and Sacramento make the trip by private automobile (Ex. 6, p. 9).

The relatively little use made by the public of the train is reflected in the fact that during a week in January 1951 selected by the Commission's staff a daily average of only 43 passengers used the train eastbound and only 34 passengers used the train westbound (Ex. 6, pp. 37-38). The number of passengers using appellant's entire train service between Sacramento and Oakland Pier has since 1946 been continually decreasing by approximately 15 per cent per year (T. 265). The Commission's Senior Transportation Engineer, Mr. James K. Gibson, testified (T. 228):

> "* * * it is apparent that the service has not been acceptable to the traveling public when it is compared with competing means of transportation, especially with the private automobile or the Pacific Greyhound Lines bus service."

In numerous recent cases courts have held that similar evidence of other available transportation service and of such meager use of a particular train by the public failed

to justify any finding of public convenience and necessity for the continued operation of that train.[14]

Concerning the evidence on this point, the California Supreme Court had only this to say:

> "On the question of the sufficiency of the evidence to support the finding of public convenience and necessity the commission points out that this midday service is between the Capital of the State and the great metropolitan San Francisco-Oakland Bay Area and that it serves the numerous intervening urban communities and territory with desirable midday railroad passenger service. It took into consideration the report of the survey of its own staff, made over an extensive period. The commission also had before it evidence on behalf of numerous intervening communities protesting against the discontinuance of the service and giving their reasons therefor; also protests from public and semi-public organizations in Sacramento, Oakland, Martinez, Richmond, Dixon, Suisun, Fairfield, Elmira and other localities. Representatives of the counties of Contra Costa and Solano and various employee unions appeared in protest."

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[14] *Illinois Cent. R. Co.* v. *Illinois Com. Commn., supra,* 410 Ill. 77, 101 N.E. 2d 588; *Application of Chicago, B. & Q. R. Co. (Chicago, B. & Q. R. Co.* v. *Municipalities of Holdrege), supra,* 152 Neb. 352, 41 N.W. 2d 157; *Application of Chicago, B. & Q. R. Co. (Chicago, B. & Q. R. Co.* v. *Nebraska State R. Commn.), supra,* 152 Neb. 367, 41 N.W. 2d 165; *Cincinnati Nor. R. Co.* v. *Pub. Util. Commn.* (1929), 119 Ohio 568, 165 N.E. 38; *Chicago & N. W. Ry. Co.* v. *Michigan Pub. Serv. Commn., supra,* 329 Mich. 432, 45 N.W. 2d 520; *Corporation Commn.* v. *Southern Pac. Co.* (1940), 55 Ariz. 173, 99 P. 2d 702; *Union P. R. Co.* v. *Pub. Service Commn.* (1942), 102 Utah 465, 132 P. 2d 128; *In re Southern Pac. Co.* (1934), 38 N. Mex. 327, 32 P. 2d 814; *In re Appl. of Union P. R. Co.* (1943), 64 Ida. 597, 134 P. 2d 1073; *Great Nor. Ry. Co.* v. *Nagle* (D.C. Mont., 1936), 16 F. Supp. 532; *Northern Pac. Ry. Co.* v. *Board of Railroad Commrs.* (D.C. Mont., 1939), 28 F. Supp. 810; *Northern Pac. Ry. Co.* v. *Board of Railroad Commrs.* (D.C. Mont., 1942), 46 F. Supp. 340; *Chicago, B. & Q. R. Co.* v. *Board of Railroad Commrs.* (D.C.Mont., 1947), 78 F. Supp. 1010.

Plainly, the relative importance of the involved points is not evidence of any need for this train. As to the reports of the Commission's own staff (Exs. 6, 14), the court fails to refer to any specific material in such reports. Not only is there nothing in such reports recommending the continuation of this service, but the Commission's staff specifically disclaimed any recommendation as to what action the Commission should take (T. 316-317). As to the protests of the various communities mentioned above, none except those of Sacramento and Richmond was ever introduced or received in evidence. It is elemental that "Nothing can be treated as evidence which is not introduced as such." *Morgan* v. *United States* (1936), 298 U. S. 468, 480.

Nor do the showings of record made on behalf of the cities of Sacramento and Richmond contain evidence of any probative value of actual public need for the continuation of the train. The presentation on behalf of Sacramento was limited to a resolution of the City Council protesting the discontinuance of the train and testimony by the City Manager that he felt "very strongly that the existing facilities should be retained", although he conceded that he never used the train service himself (Ex. 7; T. 256). The presentation on behalf of Richmond was limited to a statement protesting discontinuance of the train (T. 118). Such mere statements objecting to the discontinuance of the train and hopeful expressions that it will not be discontinued are not evidence of public need. Neither of these cities presented any evidence of the specific need of any person for the continuation of the train, the use that had actually been made or might be made of the train, or the inadequacy of the other available transportation service. Indeed, the Commission's own staff study shows that only an average of 1.7 persons per day make use of the train to and from Richmond (Ex. 6, pp. 37-38).

B. *The lack of public need for the use of self-propelled, rather than non-self-propelled, equipment*

The California Supreme Court, in its decision, states that the Commission, in concluding that self-propelled cars should be substituted for the present equipment used in the train, "took the view" that such equipment "would materially expedite service between the terminal cities and would probably result in an increase in revenue".

The Commission decisions contain no such statement, and the evidentiary facts do not support such a statement. Service by self-propelled cars would not be materially faster than the existing service. Studies of the Commission's staff estimate that self-propelled cars would provide a service of 2 hours and 15 minutes between San Francisco and Sacramento, but this estimate makes provision for only three intermediate stops between Sacramento and Oakland Pier and states that other stops "would add at least three minutes to the running time" (T. 272). Appellant's fastest daily schedule on the train in issue (westbound) is 2 hours and 50 minutes with 14 stops (Ex. 6, p. 8). When three-minute compensation is made for these additional stops on the estimated schedule of the self-propelled car, the time would become 2 hours and 48 minutes daily (2 hours and 15 minutes plus 33 minutes for 11 additional stops). This would be practically the same as the existing schedule and would still be substantially slower than that of the competing highway bus and private automobile. Moreover, if the 11 additional stops were eliminated, the intermediate communities referred to by the court as protesting the discontinuance of the train would no longer be served.

The Commission decisions and the evidence nowhere suggest that the use of self-propelled cars might result in any increase in gross revenue, and specifically recognize that rendition of the service with self-propelled cars would

still result in an annual net deficit of at least $19,000 (Ex. 14, p. 18). Indeed, the California Supreme Court concedes in its decision that "admittedly there will be a substantial deficit in such operation under the substituted service as ordered". The fact that prospective public patronage of this substituted service will thus be at such a level as to doom it at the outset to substantial loss is the strongest kind of evidence that there is no real public need for it.

But the most glaring lack of evidence in this connection arises from the fact that not a single member of the traveling public, or, for that matter, any other person, appeared to urge the use of this type of equipment, and the Commission's own staff of experts specifically refrained from making any definite recommendation as to what type of equipment should be used (T. 316-317).

4. *The violation by the Commission decisions of the National Transportation Policy and the Commerce Clause of the Constitution of the United States*

This Court, in weighing the validity of state action alleged to contravene the Commerce Clause of the United States Constitution, has stated that the fundamental inquiry "whether Congress has or has not expressed itself, * * * broadly stated, is the same: does the state action conflict with national policy?" *California* v. *Zook* (1949), 336 U. S. 725, 729.

The present case is not one where Congress has chosen to remain silent; instead, it has expressed a "national transportation policy" for interstate commerce in explicit terms. This policy, adopted by the Transportation Act of 1940 (54 Stat. 899) and set forth in the Interstate Commerce Act (49 U.S.C., preceding Sec. 1), so far as relied on here, provides as follows:

> "It is hereby declared to be the national transportation policy of the Congress * * * to promote * * *

> adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services * * * all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

It has been heretofore recognized by this Court that state legislation which interferes with the National Transportation Policy as set forth in the Transportation Act of 1940, or the policy set forth in earlier acts, must be set aside as an unconstitutional burden on interstate commerce. Thus, in *Southern Pac. Co.* v. *Arizona, supra*, 325 U. S. 761, 773, 783-784, the Court condemned the Arizona Train Limit Law because, among other things,

> "It * * * interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding § 1, 54 Stat. 899. * * * Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service, which must prevail."

Earlier, in *Davis* v. *Farmers Co-operative Co.* (1923), 262 U. S. 312, 317, the Court had declared, in voiding a Minnesota statute requiring interstate carriers not operating in that state to submit to litigation by a non-resident plaintiff on a cause of action arising elsewhere:

> "This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases

necessary to ensure to carriers efficiently operated a fair return on property devoted to the public use. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184. Avoidance of waste, in interstate transportation, as well as maintenance of service, has become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce."

Appellant submits that the decisions under review, just as in the preceding cases, specifically violate the provisions of the National Transportation Policy requiring the promotion of "economical service", the fostering of "sound economic conditions in transportation and among the several carriers" and "the establishment and maintenance of reasonable charges for transportation service". The above contentions are based upon the ground that, as shown above, the record is completely devoid of substantial evidence to support any finding of public need either for the continuation of the train or for the use of self-propelled equipment on that train, and upon the further ground that the Commission's own findings show that the train concerned is being operated at a net annual loss of approximately $105,000, that the substitution of self-propelled equipment would require a minimum investment of approximately $150,000 per car, and that there would still be an annual out-of-pocket loss of $19,000 from the operation of the train with self-propelled equipment. It is to be borne in mind, too, that these additional burdens are to be saddled upon the back of appellant's already financially-sick passenger business. The record shows that appellant had a system passenger deficit for 1950 of $34,663,361 and an estimated deficit from its passenger service conducted

within California (intrastate and interstate) of $10,291,801 for the same year (T. 332-333, 367).[15]

The Interstate Commerce Commission and the courts have alike clearly realized in recent years that the railroads' local passenger deficits lead directly and inevitably to higher interstate freight rates and to a drain upon the carriers' total financial resources necessary to meet the interstate transportation needs of the nation—results which are the obvious antithesis of the "economical service", "reasonable rates" and "sound economic conditions in transportation and among the several carriers", directed in the National Transportation Policy.

In its 64th Annual Report, dated November 1, 1950, *supra*, the Interstate Commerce Commission observed (p. 5): "The heavy drain [from the aggregate passenger train deficit] so placed on freight revenues has caused us continued and increasing concern during the year." In granting post-war general increases in interstate freight rates, the Commission has based its action in part upon the necessity to compensate the carriers for mounting passenger deficits. Thus, in *Ex Parte No. 168, Increased Freight Rates, 1948*, 276 I. C. C. 9, 35, the Commission said:

> "* * * if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations."

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[15] In *King* v. *United States*, *supra*, 344 U.S. 254, 262, this Court declared last year: "In recent years, a nationwide passenger deficit has been obvious except during the peak of wartime passenger traffic. The ratio between passenger operating expense and revenue has varied in different areas but has been uniformly unfavorable to the railroads."

See, also, *Increases in Florida Intrastate Rates* (1950), 278 I. C. C. 41, 67-68; *Ex Parte No. 175, Increased Freight Rates, 1951*, 281 I. C. C. 557, 589-590. This has been recognized, too, by the National Association of Railroad and Utilities Commissioners in its "Report of the Special Committee on Cooperation with the I. C. C. in the Study of the Railroad Passenger Deficit Problem", *supra*, September 23, 1953 (p. 24):

> "Four successive major freight rate increases have been imposed upon the shipping public since World War II, a substantial part of which increases the Interstate Commerce Commission has declared to be necessary to offset the losses from passenger service."

Only last year this Court took recognition of, and gave approval to, this policy of the Commission to permit increases in interstate freight rates to meet passenger deficits, saying in *King* v. *United States*, *supra*, 344 U. S. 254, 262:

> "This change of policy was the inevitable consequence of steadily increasing passenger operating costs, together with the growth of vigorous competition from automobiles and other forms of transportation which made it futile to compensate for the passenger deficits by increasing passenger rates."

The Court further remarked (p. 264) that there was "no ground for a claim that the Commission may not give weight to passenger revenue deficits in prescribing interstate freight rates to meet over-all revenue needs." Also, this Court has recognized, in *Colorado* v. *United States* (1926), 271 U. S. 153, that the furnishing of intrastate service at a deficit may lead to higher interstate rates and to a waste of a carrier's resources necessary to enable it to serve interstate commerce and therefore burden interstate commerce. The Court said (p. 163):

> "Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures

> from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss."

The California Supreme Court disposed of appellant's contention that the decisions represented an unconstitutional burden on interstate commerce, in most cavalier fashion. No mention at all was made in the decision of the National Transportation Policy, and the only recognition given by the court to the contention as to an unconstitutional burden on interstate commerce was to refer to certain cases cited [16] by appellant and then to state:

> "The cases so relied upon are not controlling for the reason that the railroad business here involved is entirely intrastate and there is no contention that the intrastate operations of the company as a whole are unprofitable."

The cases cited by appellant were only examples of situations where an unconstitutional burden on interstate commerce was found to exist. The mere fact that the state

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[16] *Atlantic Coast Line R. Co.* v. *Wharton* (1907), 207 U.S. 328; *Chicago, B. & Q. R. Co.* v. *Railroad Commn. of Wisconsin* (1915), 237 U.S. 220; *St. Louis & S. F. Ry.* v. *Pub. Serv. Commn.* (1921), 254 U.S. 535; *Southern Pac. Co.* v. *Arizona, supra,* 325 U.S. 761.

regulations in those cases related to interstate service, whereas the present orders relate to intrastate service, is no indication that the Commission decisions under review may also not present an unconstitutional burden on interstate commerce. Particularly is this true where, as here, it is contended that the decisions are contrary to an expressed congressional policy and not merely an unlawful interference with interstate commerce in a situation where Congress has not spoken.

The California court's holding, in effect, is that an order requiring a substantial capital expenditure to continue operating, at a substantial deficit, a particular passenger train for which there is no public need is not in violation of the National Transportation Policy and is not an unconstitutional burden on interstate commerce because the order relates only to intrastate train service. This decision is in direct conflict with the conclusions reached recently by a three-judge federal district court and by the Supreme Court of New Jersey speaking through Chief Justice Vanderbilt. *Chicago, B. & Q. R. Co.* v. *Illinois Com. Commn.* (D.C. N.D., Ill., 1949), 82 F. Supp. 368, 376; *Pennsylvania-Reading Sea. Lines* v. *Board of Pub. Util.* (1950), 5 N. J. 114, 74 A. 2d 265, 272-274 (cert. den. 340 U. S. 876). This Court has never before considered the contention that an intrastate train service order of a state commission violated the federal Commerce Clause because it was contrary to the National Transportation Policy. No question as to the validity of the order under the Commerce Clause was raised in *Alabama P. S. Commn.* v. *Southern R. Co., supra*, 341 U. S. 341. But this Court has indicated that a burden on interstate commerce may be caused by the furnishing of unneeded intrastate service at a substantial loss. *Colorado* v. *United States, supra*, 271 U. S. 153, 163. Furthermore, it was said in *King* v. *United States, supra*, 344 U. S. 254, 263, that the National Trans-

portation Policy reflects a "broad concept of the unity of the Nation's transportation system".

In view of the importance and novelty of this question and the conflict presented, the instant case is inherently one where this Court has traditionally taken jurisdiction.

5. *The violation by the Commission decisions of the Due Process Clause of the Fourteenth Amendment to the Constitution*

On the due-process issue the California Supreme Court said:

> "Where the overall operations of the railroad's intrastate service is profitable [17] it has been rightly stated that the commission may compel the continuation of a portion of such services at a financial loss and that such requirement raises no issue under the Federal Constitution" (citing *Alabama P. S. Commn.* v. *Southern R. Co., supra*, 341 U. S. 341.

The court thus holds that in no circumstances will an order be stricken down under the Due Process Clause which requires the furnishing of unprofitable train service where the system operations are profitable. In so holding, the court has at once patently misconstrued this Court's decision in the *Alabama P. S. Commn.* case and adopted a view in conflict with that expressed in most of the recent decisions in other states and in the federal courts.

In the *Alabama P. S. Commn.* case, although the majority of the Court dealt with the issue of the discontinuance of an unprofitable service by dictum only, that dictum, as expressed by Chief Justice Vinson, makes it clear that a

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[17] While appellant's freight and passenger business in California, considered as a whole, is profitable, its California passenger business (intrastate and interstate combined) was rendered at a deficit of $10,291,801 for 1950 (T. 367).

carrier, even with profitable system operations, is entitled to be relieved of unprofitable passenger service where, as here, there is no public need therefor. The exact language was (341 U. S. 346-347):

> "However, our concern in this case is limited to the propriety of a federal court injunction enjoining enforcement of a state regulatory order. * * * We do note that in passing upon similar contentions in the past, this Court has recognized that review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved when the return on the entire intrastate operations of a utility is drawn into question. *Atlantic Coast Line R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 24-27 (1907). The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation *but depend more upon the predominantly local factor of public need for the service rendered.*" (Emphasis supplied.)

A substantial number of decisions in other state supreme courts and in federal district courts have indicated that orders forbidding the discontinuation of passenger service operated at a loss violated the Due Process Clause, even though system operations were profitable, where there was no public need for the service. *M-K-T R. Co.* v. *State* (1941), 189 Okla. 685, 119 P. 2d 835, 840; *St. Louis-S. F. R. Co.* v. *State* (1950), 204 Okla. 432, 230 P. 2d 709, 714-716; *Application of Chicago, B. & Q. R. Co.* (*Chicago, B. & Q. R. Co.* v. *Municipalities of Holdrege*), *supra*, 152 Neb. 352, 41 N. W. 2d 157, 161; *Blease* v. *Charleston & W. C. Ry. Co.* (1928), 146 S. C. 496, 144 S. E. 233, 239; *Hessey* v. *Capital Transit Co.* (C. A., Md., 1949), 66 A. 2d 787, 790; *Pennsylvania-Reading Sea. Lines* v. *Board of Pub. Util.*, *supra*, 5 N. J. 114, 74 A.2d 265, 272, cert. den. 340 U. S. 876; *Delaware*,

L. & W. R. Co. v. *Van Santwood* (D. C., N. D., N. Y., 1914), 216 Fed. 252, 254; *Atlantic Coast Line R. Co.* v. *Pub. Serv. Commn., supra,* 77 F. Supp. 675, 686; *Northern Pac. Ry. Co.* v. *Board of Railroad Commrs.* (D. C., Mont., 1942), 46 F. Supp. 340, 342; *Chicago, B. & Q. R. Co.* v. *Illinois Com. Commn., supra,* 82 F. Supp. 368, 377.

In the absence of evidence of public need to justify compelling appellant to continue operating the train in question at a loss, or to use self-propelled equipment on that train, there is denial of due process as held by these decisions. The constitutionality of the Commission action is not sustained by a finding by the Commission of the existence of public need when that finding is not supported by the evidence. For, where a constitutional issue is dependent upon a factual determination, a finding made without evidence, or upon insufficient evidence, is an arbitrary act against which relief will be afforded by this Court. *Northern Pac. Ry. Co.* v. *Dept. of Pub. Works* (1925), 268 U. S. 39, 44-45.

It is significant also that the action of the Commission, upheld by the court, in refusing to permit the abandonment of unneeded and losing passenger service where system operations are profitable, is contrary to the recommendations recently made by the National Association of Railroad and Utilities Commissioners. In that organization's 1953 "Report of the Special Committee on Cooperation with the I. C. C. in the Study of the Railroad Passenger Deficit Problem," *supra,* it is said (p. 3):

"Recommendation No. 1

"That the railroads re-evaluate the results of the May, 1951, study of individual deficit passenger trains in the light of changes in mail pay rates and in operating expenses, and that each railroad seek authority from the appropriate commission, or commissions, to

discontinue operation of each passenger train which is producing (at current levels of rates, fares and charges) revenues substantially less than the operating expenses (at current levels of wages and prices) reflected in the accounts shown on the summary of the May, 1951, study, attached to this report as Appendix XIX; and that the regulatory bodies in acting upon such applications should adhere vigorously to the principle that, where the service cannot be made compensatory, its abandonment should be permitted, having due regard for public convenience and necessity."

Finally, the portion of the Commission decisions which requires a substantial capital expenditure for self-propelled cars, to be operated at a substantial loss and without public need therefor, violates the Due Process Clause under previous holdings of this Court. Thus, in *Oregon R. & N. Co. v. Fairchild* (1912), 224 U. S. 510, this Court held that a state commission order requiring a railroad company to expend money for the construction of a switch connection violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and was invalid because there was a lack of any public need for the construction.

The violation of the Due Process Clause of the Fourteenth Amendment is particularly apparent with respect to that portion of the Commission decisions requiring the use of self-propelled, rather than non-self-propelled, equipment on the train. In the absence of any showing that self-propelled equipment is of advantage to the public in the speed or comfort of the service, the Commission's action in requiring appellant to make a substantial investment ($150,000 per car) in such equipment, which might well have to be discarded in a short time, can be viewed only as arbitrary. If there were ever Commission action that was so unsupported by evidence and a rational basis as to be arbitrary, it is the action of the Commission in specify-

ing that the cars used on the train concerned should be "self-propelled". If the Commission's action could be sustained on the naked ground that the train should consist of "new" equipment because the "old" equipment was inadequate—which we do not concede—there is no more reason for prescribing "new" self-propelled cars than in prescribing "new" non-self-propelled cars and locomotives.

6. *Deprivation of due process by limitation of scope of review*

Orders of the Commission are subject to judicial review by no California court except the Supreme Court of California (Sec. 1759, Public Utilities Code). The scope and method of judicial review before that court, originally set forth in Section 67 of the California Public Utilities Act, are now contained in Sections 1756, 1757 and 1760, California Public Utilities Code, which provide as follows:

> Sec. 1756. *Time for application for review to Supreme Court: Return of writ: Hearing.* Within 30 days after the application for a rehearing is denied, or, if the application is granted, then, within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.
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> Sec. 1757. *Introduction of new evidence: Limit of review: Finality of findings and conclusions.* No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall

not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

Sec. 1760. *When Supreme Court to exercise independent judgment on law and facts.* In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

Section 1760 was not contained in the original Section 67 of the Public Utilities Act (Stats. 1915, p. 161), but was adopted as an amendment thereto in 1933 (Stats. 1933, p. 1157). The court below described the historical reason for the legislative adoption of this section thus:

> "Language found in the opinion of the Supreme Court of the United States in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, apparently was responsible for some apprehension concerning the sufficiency of the court review provided by our statute when federal constitutional questions were involved, and that due process required the further independent judgment of this court in such cases on both the law and the facts."

Nevertheless, the court, construing Sections 1756, 1757 and 1760 together, determined that the procedure set forth therein did not require or permit it to weigh the evidence

before the Commission on the question of public need for either the continuation of the train or the substitution of self-propelled cars. It conceived its duty under these statutory provisions to be merely of ascertaining whether there was evidence before the Commission to support its finding of public need, and refused to weigh the evidence on this point. Thus, it said:

> "* * * nor was it contemplated that it [Section 1760] should have the effect of constituting the court the arbiter of disputed questions of fact in matters coming before the commission."
>
> "This court will not attempt to resolve conflicts in the evidence on the question of public convenience and necessity nor substitute its judgment for that of the commission on a subject so peculiarly within its jurisdiction and justifiably based on the record before it."

As pointed out above, there can be no doubt that the question of public need for the train or for the substitution of self-propelled equipment is the keystone upon which appellant's aforementioned substantive constitutional contentions must stand or fall. Consequently, that question is definitely a question of "constitutional fact". Appellant submits that when the above statutory provisions are thus construed as not requiring the court to weigh independently the evidence on this question of public need, the procedure provided therein is invalid under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as is also the court's action in refusing to weigh the evidence on this question, under the decision in *Ohio Valley Water Co.* v. *Ben Avon Borough* (1920), 253 U. S. 287, and a long line of subsequent decisions of this Court. As developed elsewhere in this statement, there was, in appellant's judgment, no evidence whatever of public need for the continued operation of the train in question or for the

substitution of self-propelled equipment. But if there were any such evidence, it was overbalanced by the overwhelming evidence of lack of need for the train, and the court's interpretation of the California law to the effect that it should not weigh the evidence of public need constitutes a denial of due process.

A brief review of the *Ben Avon* and subsequent decisions makes it plain that under these cases due process requires an independent judicial weighing of the evidence in the limited field of constitutional fact questions.

In the *Ben Avon* case the Pennsylvania Supreme Court had reversed an order of a state superior court, which had set aside a commission order prescribing certain reduced water rates, on the ground that they were confiscatory and thus unconstitutional. It is clear that the Pennsylvania Supreme Court thought that the superior court had erred in conceiving its duty to be to weigh the evidence and to substitute its judgment for that of the commission. For the Pennsylvania Supreme Court had said (253 U. S. 288-289):

> "A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values, there was merely the substitution of the former's judgment for that of the commission, in determining that the order of the latter was unreasonable."

And the Pennsylvania Supreme Court held that "as there was competent evidence tending to sustain the Commission's conclusion • • • the Superior Court should not have interfered therewith" (253 U. S. 288). In other words, the Pennsylvania Supreme Court regarded the scope of judicial review to be limited as the California Supreme Court has limited its review in the present case. But the United States Supreme Court reversed the decision, indicating that this

limited review did not accord with the required "independent judgment" or with due process, and, in effect, approving the weighing-of-the-evidence approach followed by the Pennsylvania Superior Court. This Court declared (253 U. S. 289):

> "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. * * * In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

That the exercise of independent judgment contemplated under the *Ben Avon* case extends beyond merely ascertaining whether there is evidence to support the findings of an administrative body was also made clear in *Lehigh Valley R. Co.* v. *Commrs.* (1928), 278 U. S. 24, 37-41. In that decision this Court held that the scope of judicial review accorded under a New Jersey statute was sufficient under the *Ben Avon* rule. But this was solely because the New Jersey courts had construed the applicable procedural statute as permitting more than a mere determination as to whether there was any evidence to support the administrative findings. Thus, the New Jersey courts had declared, as quoted in this Court's decision (278 U. S. 38):

> "If this language is taken literally, we should be powerless in any case within the jurisdiction of the Board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence

to the contrary might be. It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. * * * To determine then whether the commissioners had jurisdiction, we must first determine whether the existing rate was unjust and unreasonable, and in determining that fact we are not limited to the question whether it clearly appears that there was no evidence before the board to support reasonably its order; section 16c does not purport to limit the scope of our inquiry into the fact, and we must therefore determine it in the usual way according to the whole of the evidence."

Again, in *St. Joseph Stock Yards Co.* v. *United States* (1936), 298 U. S. 38, this Court was specifically called upon to decide whether, under the *Ben Avon* case, the reviewing court was required to weigh the evidence as to charges that certain prescribed rates were confiscatory. The Court answered affirmatively and explained the basis for the rule in detail. It said (pp. 51-52):

> "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these [constitutional] limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. * * * It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of

> property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The above statement was reiterated with approval in *Baltimore & O. R. Co.* v. *United States* (1936), 298 U. S. 349, 367-368.

Although the rule requiring independent judicial review of "constitutional facts" was originally applied to the question of confiscation in rate cases, it has since been extended to cover jurisdictional "constitutional facts" generally. *Crowell* v. *Benson* (1932), 285 U. S. 22. This was also made clear by Mr. Justice Brandeis speaking for the Court in *Phillips* v. *Commr.* (1931), 283 U. S. 589, who also recognized this rule as an exception to the usual rule that administrative findings are binding if supported by substantial evidence. There he said (p. 600):

> "Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings."

It is significant, too, that the federal district courts have felt themselves required under this doctrine to grant a trial *de novo* in cases in which there was an attack upon the constitutionality of orders of state commissions forbidding abandonment of intrastate passenger trains. *Atlantic Coast Line R. Co.* v. *Pub. Serv. Commn., supra,* 77 F. Supp. 675, 680-681; *Ann Arbor R. Co.* v. *Michigan Pub. Serv. Commn.* (D. C., E. D., Mich., 1950), 91 F. Supp. 668, 671.

The *Ben Avon* case has never been overruled. *Staten Island Edison Corp.* v. *Maltbie* (1947), 296 N. Y. 374, 73

N. E. 2d 705, 707. This doctrine of independent judicial review of factual issues upon which constitutional rights are based is one of the bulwarks of our constitutional system, "to the end that the Constitution as the supreme law of the land may be maintained". *St. Joseph Stock Yards Co.* v. *United States*, *supra*, 298 U. S. 38, 51-52. The construction placed by the California court upon the provisions of California law pertaining to court review of questions involving the Federal Constitution arising from orders of the Commission is so restricted that such sections, as so interpreted, are palpably unconstitutional. Accordingly, this phase of the case is also emphatically one over which this Court should take jurisdiction to re-announce the court review of facts that is required in such instances by due process.

Conclusion

It is submitted that the appellate jurisdiction of this Court has been properly invoked; that the federal questions presented, in the light of the automotive transportation revolution, must now be considered both novel and tremendously important; that in view of the numerous conflicts on these questions between the present decision and the weight of modern judicial authority, the issues raised by this appeal are substantial in merit and of outstanding public importance; and that this Court's consideration of the appeal, upon full briefs and argument, is therefore warranted.

Respectfully submitted,

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Dated: October 23, 1953.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

S. F. 18,667

SOUTHERN PACIFIC COMPANY, a Corporation, *Petitioner,*

vs.

PUBLIC UTILITIES COMMISSION, ETC., et al., *Respondents*

This proceeding was brought by Southern Pacific Company to review an order of the Public Utilities Commission.

On April 15, 1950, the company filed an application with the commission for the approval of its proposal to discontinue the operation of its midday passenger trains, "The Statesman" and "The Governor", running between Oakland Pier and Sacramento. The approval was sought on the ground that these "passenger trains do not handle sufficient business to justify their continued operation and that due to other services available, the public will suffer no substantial, if any, inconvenience by their discontinuance." A public hearing on this application was held on July 6, 1950, and the matter was submitted.

On September 27, 1950, the commission reopened the matter for further hearing, and also ordered, on its own motion, as authorized by Section 705 of the Public Utilities Code, an investigation into the adequacy of the company's passenger train service "between various sections of the state, and particularly between San Francisco and Sacramento, and points intermediate thereto, and between San Francisco, Sacramento and points on its San Joaquin Valley and Coast lines, including local service between San Francisco and San Jose and points intermediate thereto."

This order stated that the commission had received numerous complaints charging insufficiency and inadequacy of the service afforded by the company, including the service between San Francisco and Sacramento and intermediate points, and that the application for discontinuance

of "The Statesman" and "The Governor" should not be determined without further study for the purpose of inquiring whether improvement in service and economies of operation might be effected to justify continued operation of those trains and the inauguration of sufficiently frequent and convenient passenger train schedules between those points. The two proceedings were consolidated. Public hearings were held on April 26, 1951, and September 20, 1951.

Pending the determination of the matter the commission's staff made a 12 months' survey and investigation of the services provided by the two trains involved and by other trains and carriers in the area in question. Based on the evidence taken at the hearings and on the investigation of its staff the commission, under date of May 13, 1952, rendered its opinion and the items of the order now under consideration. In the opinion the commission outlined the proceedings that had been taken and a portion of the evidence before it. It then concluded that the company had not justified its request for the discontinuance of the midday trains in question; that the public interest required that the use of the steam locomotive and standard railway equipment employed in the operation of those trains be abandoned and that there should be substituted in their place "modern self-propelled railway passenger cars"; that trains other than the midday trains were in need of refurbishing and modernization; and that the public interest required that the company make studies and submit to the commission certain plans designated in the order. The order consists of four items as follows:

1. That the company discontinue its midday passenger trains ("The Statesman" and "The Governor") "by the use of steam locomotive and standard railway passenger equipment and shall substitute in lieu thereof railway passenger service by modern self-propelled railway passenger cars."

2. That other trains of the company ("The Senator" and "The El Dorado") be "refurbished to a standard comparable to modern, railway passenger equipment."

3. That the company "shall make a study and prepare and submit to the commission a plan for establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service"; and

4. That the company "shall make a study and prepare and submit to the commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities."

A petition for rehearing was filed. Particularly applicable to item 1 it alleged that the decision "is unlawful in that the commission has not regularly pursued its authority, has acted beyond or in excess of its jurisdiction, and has violated the rights" of the company under the state and federal constitutions; that the application to discontinue its midday trains was denied notwithstanding the undisputed evidence that they were being operated at a net annual loss of $105,000 or more; that there was a lack of evidence of further need for the operation of those trains, and that there was undisputed evidence of the existence of an abundance of public-carrier passenger transportation service furnished by other common carriers between the points served by those trains, and "sufficient to meet every public passenger transportation request"; that the commission in ordering the substituted service has done so without an affirmative finding that the public interest requires it, and has completely usurped the "role of management" by prescribing the particular type of equipment.

With reference to item 2 the rehearing was sought on the ground that it pertained to the equipment of trains other than midday trains not sought to be discontinued, and as to which no findings were made by the commission to support the order.

Item 3 was objected to on the ground that it was made without notice or opportunity to be heard on the subject, and without evidence or findings to support it as required by law.

Item 4 was challenged also on the ground that it was

made without notice or an opportunity to be heard and without findings to support it.

The petition for a rehearing was denied but the commission modified the decision by supplementing its findings to meet the contentions of the company in the petition for rehearing. It was found that public convenience and necessity required that the midday passenger service between San Francisco and Sacramento be continued, that "the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient," and that an improvement in such service is required; that the company has not discharged its public duty in that it failed to provide the improvements in service required, having the ability so to do; that the improvements in service, equipment and facilities required will not constitute an undue financial or other burden upon the company; and that public convenience and necessity require that the investigations and reports ordered by the commission be made by the company and submitted to the commission; that the "operations, service, equipment and facilities concerning which said studies and reports are to be made are inadequate and insufficient and that public convenience and necessity requires the improvement thereof."

The items in the order will be considered separately as enumerated. As to item 1 the company reiterates its contention that in refusing to authorize the discontinuance of the midday passenger service between Oakland Pier and Sacramento, and in requiring a change in equipment for that service, the commission has exceeded its authority; that its action is not supported by and is contrary to the evidence; that its action is arbitrary and unreasonable and deprives the company of its property without due process of law, and that the action of the commission is an unauthorized burden on interstate commerce.

The power of the commission to act in the premises and the scope of review by this court are again brought into question and sought to be examined. These questions have been determined, it would seem, with sufficient particularity and clarity; however they will again be briefly stated.

It is provided in Section 23 of Article XII of the state constitution that the commission shall have and exercise such jurisdiction to supervise and regulate public utilities in this state "as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers [upon the commission] respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Referring to the re-organization of the commission in 1911 this court said in San Diego etc. Ferry Co. v. Railroad Com., 210 Cal. 504 (in 1930 and before the amendment of section 67 of the Public Utilities Act in 1933, hereinafter noted), at page 509: "The administration of the new law was placed in the hands of the Railroad Commission [now called Public Utilities Commission], unhampered and uncontrolled by court interference except to a specified and limited extent. Section 67 of the Public Utilities Act, with reference to the powers of this court, provides in part: 'The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States, or of the State of California. The findings and conclusions on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination . . . . No court of the state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission . . . .' In Clemmons v. Railroad Com., 173 Cal. 254, it was said at page 258, that 'the legislature might have withheld from the courts of the state any power of reviewing the acts of the commission. (Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640.) The power to review which is given must be exercised within the limits and upon the conditions which the legislature has seen fit to fix.' In Oro Electric Corp. v. Railroad Com., 169 Cal. 466, this court said at page 471: 'The validity of section 67 of the Public Utilities Act, in so far as it limits the scope

of review by state courts of the acts of the commission, must be regarded as finally settled by the telephone company case. By that section, the findings and conclusions of the commission on questions of fact are made final and not subject to review. Here the commission found the ultimate fact that the public convenience and necessity did not require the exercise of the privileges in controversy, and neither the sufficiency of the evidence, nor the soundness of the reasoning, upon which that finding was based, can be considered on this proceeding.' Again, referring to said section 67, it was said in Sexton v. Atchison, etc. Ry. Co., 173 Cal. 760: 'The clear intent of the provison as a whole is to place the commission, in so far as the state courts are concerned, in a position where it may not be hampered in the performance of any official act by any court, except to the extent and in the manner specified in the act itself.' (See, also, Truck Owners & Shippers v. Superior Court, 194 Cal. 146)."

Language found in the opinion of the Supreme Court of the United States in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, apparently was responsible for some apprehension concerning the sufficiency of the court review provided by our statute when federal constitutional questions were involved, and that due process required the further independent judgment of this court in such cases on both the law and the facts. Accordingly the legislature in 1933 amended Section 67 of the Public Utilities Act (Stats. 1933, p. 1157; now Section 1760 of the Public Utilities Code, enacted 1951). That section as amended reads as follows:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

The construction, scope and application of the amended section first came before this court in 1936 in Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737. It

was there held that the amendment did not have the effect of changing the powers and duties of the commission or of this court theretofore existing in the consideration of questions arising under the federal constitution. It was also held that the legislature did not intend by that amendment, even if it could so provide, to transfer to this court the traditional regulatory functions of the commission; nor was it contemplated that it should have the effect of constituting the court the arbiter of disputed questions of fact in matters coming before the commission.

The purpose of the review by this court is also stated in Section 1756 of the Public Utilities Code as that "of having the lawfulness of the * * * order or decision * * * inquired into and determined" and in the second sentence of Section 1757 which provides: "The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State." [17] The inquiry under either section is ob-

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[17] Sections 1756 and 1757 in full provide:

"§ 1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

"§ 1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

viously the same, namely, the consideration by the court of the validity of the order under applicable law.

Although Section 1757 provides that the findings and conclusions of the commission on questions of fact shall be final, the findings and conclusions referred to necessarily are those arrived at from the consideration of conflicting evidence and undisputed evidence from which conflicting inferences may reasonably be drawn. Findings and conclusions drawn from undisputed evidence and from which conflicting inferences may not reasonably be drawn, present questions of law. In either event it is for the commission under the statute to make its findings and draw its conclusions therefrom as a basis for its order. If there is such a basis and the commission has acted within constitutional bounds, its action may not be disturbed by this court on review.

The powers expressly conferred upon the commission by the legislature with particular reference to item 1 of the present regulatory order are set forth in Sections 730, 761, 762 and 763 of the Public Utilities Code, the pertinent portions of which provide:

"§730. The Commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers . . . . "

" § 761. Whenever the Commission, after a hearing finds that * * * equipment, appliances, facilities, or service of any public utility * * * are * * * unreasonable, * * * improper, inadequate, or insufficient, the Commission shall determine and, by order * * * fix * * * practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed . . . . "

"§762. Whenever the Commission, after a hearing, finds that * * * improvements to, or changes in, the existing equipment, * * * facilities, or other physical property of any public utility * * * ought reasonably to be made * * * to promote the * * * convenience of * * * the public, or in any other way to

secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, * * * improvements, or changes be made * * * in the manner and within the time specified in the order. . . ."

"§763. Whenever the Commission, after a hearing, finds that any railroad corporation * * * does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The Commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

Based on an extended record the commission concluded as to the subject matter of item 1 that the midday train service with present equipment and facilities be discontinued; however that public convenience and necessity required a continuance of such a scheduled service and that it be continued by the substitution of the modern equipment specified. In so concluding the commission took the view that the new equipment when employed would result in facilities more attractive to the traveling public, would materially expedite service between the terminal cities and would probably result in an increase in revenue. There was a division of opinion in the commission on these questions. Two of the commissioners were of the opinion that the record failed to support a finding that public con-

venience and necessity required the continuance of this midday service and that the substituted service would not result in increased patronage or sufficiently reduce the deficits to justify the continuance. On the question of the sufficiency of the evidence to support the finding of public convenience and necessity the commission points out that this midday service is between the Capital of the State and the great metropolitan San Francisco-Oakland Bay Area and that it serves the numerous intervening urban communities and territory with desirable midday railroad passenger train service. It took into consideration the report of the survey of its own staff, made over an extensive period. The commission also had before it evidence on behalf of numerous intervening communities protesting against the discontinuance of the service and giving their reasons therefor; also protests from public and semi-public organizations in Sacramento, Oakland, Martinez, Richmond, Dixon, Suisun, Fairfield, Elmira and other localties. Representatives of the counties of Contra Costa and Solano and various employee unions appeared in protest.

The company contends that even if there is some evidence of public convenience, which is not conceded, the evidence on the question of public necessity is undisputed and should compel a finding in its favor. It refers to the report of the commission's staff which estimates that 80 per cent of the travelers between San Francisco and Sacramento use private automobiles; 13 per cent go by bus; and the remaining 7 per cent go by rail or by plane; that despite increasing population in the area, the traffic on the company's local trains over the route has been decreasing since 1946 at the annual rate of 15 per cent; that spot checks disclosed that between 34 and 43 revenue passengers daily used the runs sought to be discontinued; that to pay expenses an increase in passenger revenue of between 58 and 128 per cent would be necessary; that U. S. Highway No. 40, connecting Oakland and Sacramento, consists for the most part of four lanes and is five miles shorter than the railroad distance between the two cities; that the running time by automobile between San Francisco and Sacramento is from one hour and fifty-five minutes; that the runs by the trains in ques-

tion consume about two hours and thirty minutes between Oakland and Sacramento and require an additional thirty minutes for ferry connections with San Francisco; that bus transportation between the two cities requires two hours and five minutes for an express, and the slowest locals require up to three hours and fifteen minutes; that airlines require less than an hour to make the flight but an estimated hour and one-half is required to travel to the airport; that in addition to its midday service the company operates two other local trains daily (not midday) between Oakland and Sacramento; that Pacific Greyhound Lines operates about 25 busses each way daily between the two cities, including 7 non-stop runs; that Burlington Transportation Co. runs 4 busses each way daily; that United Air Lines and Southwest Airways operate a total of 10 flights daily between the two cities.

The commission points to the estimate of its staff that with the new equipment the net annual operational deficit would be reduced to $19,000. To this the company replies that the new equipment would not carry mail, express or baggage, resulting in a loss of $150,000 annually and that the purchase of the new equipment would require a capital outlay of $140,000 per car, with an added $10,000 per car for spare parts.

When the question of "necessity" is presented, that term should be given the meaning ascribed to it in San Diego etc. Ferry Co. v. Railroad Com., supra, 210 Cal. 504, where it was said at page 511, "The word 'necessity' must be taken in a relative sense. The Supreme Court of Illinois has well expressed its meaning in Wabash C. &. W. Ry. Co. v. Commerce Com., 309 Ill. 412, where it was said: 'When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction or extension of any public utility, the word 'necessity' is not used in its lexicographical sense of 'indispensably requisite.' If it were no certificate of public convenience and necessity could ever be granted. . . ."

The company calls attention to the fact that on the financial side the cost of continuing the operation of the trains in question with the substituted equipment would result in the

continuation of a loss of approximately $105,000 annually, and it is argued that for that additional reason public convenience and necessity does not appear.

Whether public convenience and necessity exist cannot turn on the question of deficits in the operation of some particular segment of the company's intrastate business. This is not and cannot be seriously controverted. But the company contends that since there have been deficits in the operation of the midday trains, and admittedly there will be a substantial deficit in such operation under the substituted service as ordered, the interstate commerce business in which the company is engaged will be unconstitutionally burdened. The company refers to and relies upon decisions of the United States Supreme Court holding that attempts by state commissions to compel railroads at substantial expense to stop interstate trains at local stations were invalid as an unconstitutional burden on interstate commerce (citing Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328; Chicago B. & Q. Ry. Co. v. R. Com. of Wis., 237 U. S. 220; St. Louis & S. F. Rys. v. Pub. Svs. Com., 254 U. S. 35; and referring to Southern Pacific Co. v. Arizona, 325 U. S. 761, holding invalid a requirement of the Arizona statute limiting the length of railroad trains engaged in interstate commerce.

The cases so relied upon are not controlling for the reason that the railroad business here involved is entirely intrastate and there is no contention that the intrastate operations of the company as a whole are unprofitable. Where the overall operations of the railroad's intrastate service is profitable it has been rightly stated that the commission may compel the continuation of a portion of such services at a financial loss and that such requirement raises no issue under the Federal Constitution (Alabama Pub. Svs. Com. v. Southern Railway Co., [1951] 341 U. S. 341). The decision in that case went upon a procedural point but the majority of the court clearly and correctly announced the conclusion that a review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved where the return on the entire intrastate operations of a utility are

drawn into question. It has also been held that problems raised by the discontinuance of local trains "cannot be resolved alone by reference to * * * loss in their operation but depend more upon the predominantly local factor of public need for the service rendered." (Chesapeake & Ohio R. Co. v. Pub. Svs. Com. of West Virginia, 242 U. S. 603, 608.)

Based upon the evidence before it the commission found that the company had not sustained the burden resting upon it to make out a case justifying a discontinuance of this particular service. It also found that public convenience and necessity requires the continuance of the service between San Francisco and Sacramento; that the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient; and that the company has attempted to maintain this service "with outmoded equipment which was relegated to this service when it became outmoded and uneconomical in the service where it was originally used."

This court will not attempt to resolve conflicts in the evidence on the question of public convenience and necessity nor substitute its judgment for that of the commission on a subject so peculiarly within its jurisdiction and justifiably based on the record before it. It also is not for the court to say that the commission was wrong in concluding that service with the substituted equipment may result in the benefits it has forecast and sought to achieve. The fact that the effect of the order of substitution is to a more or less degree experimental does not destroy it. If it does not work out as contemplated the commission has jurisdiction to entertain a future application concerning the same subject matter.

The company further contends that the order of substitution unlawfully usurps the function of management. As statutory authority for the order the commission points to the provisions of Sections 730, 761, 762 and 763 above set out. That the language of those sections in terms specifically authorizes this kind of an order may not be questioned. They empower the commission to "determine the kind and character of facilities and the extent of the operation

thereof, necessary reasonably and adequately to meet public requests for service by common carriers" (§730). By Section 761 it is provided that whenever the commission, after a hearing finds that the equipment of the utility is inadequate it shall determine and by order require the proper equipment to be employed. Section 762 contains language to similar effect. And Section 763 authorizes the commission, upon hearing and findings, to require adequate train service as to time schedules, equipment and transportation facilities.

In exercising the powers thus granted it may not be disputed that the commission to some extent invades the functions of management. But they are not necessarily unlawfully invaded. They are subjected to the exercise of the police power of the state in the regulation of the public utility. It is undoubtedly true that for the most part all lawful regulations of a public utility in the exercise of the police power are to some degree an invasion of the managerial functions of the utility. In the absence of such regulations the utility would be free to exercise all powers of management otherwise within the law. Without question the order of substitution of one equipment for another by a transportation company is within the field of management; but it does not follow that as such it is necessarily outside of the field of an appropriate regulatory order.

Probably the most conspicuous example of an asserted but rejected claim of "invasion of management" on the part of this commission was when it issued an order requiring the construction of a union passenger station and terminal in the City of Los Angeles. After an extensive investigation covering a period of years the commission issued an order described by this court in The Atchison etc. Ry. Co., et al. v. Railroad Com., 209 Cal. 460, 464, as an order directing The Atchison Topeka and Santa Fe Railway Company, the Los Angeles & Salt Lake Railroad Company, and the petitioner herein, the Southern Pacific Company, "to make and construct a union passenger station within that portion of the city of Los Angeles [describing it] together with such tracks, connections and all other terminal facilities and additions, extensions, improvements and changes

in the existing railroad facilities of [the railroads] as may be reasonably necessary and incidental to the use of said union passenger station, at a cost, as estimated or suggested in said order, of approximately $10,000,000 and in substantial compliance with the plans outlined by said Commission."

A brief history of that proceeding is set forth in the opinion of this court, the judgment in which was affirmed by the Supreme Court of the United States in Atchison, Topeka and Santa Fe Railway Co. v. Railroad Commission of California (1931), 283 U. S. 380. There as here it was contended that the construction of a union station with the manifold details and specifications prescribed was "a matter of business policy and management and not a proper subject for control under the police power of the state." That case involved the validity of an order of the commission requiring the abandonment of widely separated railway stations, terminals, tracks, and facilities, and the substitution of a centrally located union passenger terminal. The final decisions in that case are conclusive on the question of the power of the commission to order the substitution in the present matter.

From the foregoing it is concluded that in making the order contained in item 1 the commission has acted within constitutional bounds and has regularly pursued its authority.

In its petition for rehearing before the commission the company objected to item 2 of the order requiring a refurbishing of the trains "The Senator" and "The El Dorado" on the ground that it was void for lack of findings to support it and that if findings had been made the order would so completely invade the field of management in specifying "such details as the kind of seats and the type of floor covering" as to render it invalid. In its modification of the order in denying the petition for rehearing the commission supplied the findings. Although the petition for the writ includes this item in its prayer for annulment the company later indicated its compliance with the order. It therefore becomes unnecessary to discuss the question of its validity or do otherwise than to affirm it.

Item 3 is objected to on the ground that it is beyond the scope of the investigation instituted by the company and that the terminal facilities mentioned in the order are condemned as inadequate without notice or hearing. To repeat, this order requires that the company "shall make a study and prepare and submit to the commission a plan for establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service."

If this order had the effect of requiring a substitution of bus service for ferry service between San Francisco and the company's East Bay terminal it would be void for lack of notice, hearing, and evidence to support it. That such an order was not within the original scope of the proceeding may not be disputed. That there was no notice or hearing on this subject may likewise not be disputed. It is also true that there is insufficient evidence in the record to support the finding of inadequacy and insufficiency of the service and present equipment. However widespread asserted general complaints may be concerning the inadequacy of the present equipment and service, those complaints may not serve as the basis for a finding of the commission on the subject, much less as support for an order of substitution of bus for ferry service. Notice and hearing, or an opportunity to be heard, are prerequisites to a finding on such a subject. So-called judicial notice on the part of the commission of conditions with respect to the necessity for such a regulatory order cannot take the place of evidence regularly received and the necessary findings to support it. But that is not to say that the commission may not of its own motion institute proceedings to investigate the subject matter based upon complaints, informal or otherwise, or its general knowledge of the conditions pertaining to the service of a utility under its jurisdiction. The company was justified in objecting to this item of the order as based upon a finding of inadequacy of present facilities made without notice and hearing.

But it is not necessary to annul item 3 because of the lack of support for the findings complained of. The order

is not one of substitution of bus for ferry service. It is an order that the company make a study and prepare and submit a plan with the end in view that such substitution may be made if and when, after appropriate notice, hearing, and findings, some such a plan be put into effect. In its present form this item cannot be deemed a final order. It is plainly preliminary and as such is within the jurisdiction of the commission to make on its own motion. The findings required by the statute are not necessary to support it and the findings made on this subject should be disregarded.

The same conclusion applies to item 4 which requires the company "to make a study and prepare and submit to the commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities." The purported findings of the commission on this subject made on consideration of the petition for rehearing were an obvious endeavor to support this item of the order. They were made without notice or hearing, are ineffective, and should be disregarded. This item of the order was also preliminary and needed no findings as required by the statute to support it.

As above considered and construed the order and each item thereof is affirmed.

SHENK, *J.*

We concur.

GIBSON, *C. J.*
CARTER, *J.*
TRAYNOR, *J.*
SPENCE, *J.*

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOUTHERN PACIFIC CO.

vs.

PUBLIC UTILITIES COMMISSION

S. F. 18 667

DISSENTING OPINION

Under certain circumstances, the Public Utilities Commission may compel the continuation of operation of a segment of service at a loss, when justified by public convenience and necessity, and it has broad powers in regard to train schedules and deployment of equipment. However, I do not find in the record here presented any evidence to support that portion of the order requiring the extensive capital outlays which the railroad must make to comply with it.

The sole reference to the use of Budd Diesel cars to supplant the petitioner's present equipment appears in the reports of the commission's experts. There the new trains are suggested as one of several possible alternatives to the present service, all of which are characterized as unsatisfactory in reducing operational deficits. Although, as stated, "this court will not attempt to resolve conflicts in the evidence", there must be some evidence of public necessity and convenience to support an order which admittedly requires the expenditure of hundreds of thousands of dollars to establish a new type of service to be operated at a loss.

For these reasons, I would annul that portion of the order requiring the use of "modern self-propelled railway passenger cars" on the Sacramento midday runs.

EDMONDS, *J.*

APPENDIX B

Decision No. 47161, Application No. 31304, Case No. 5234

(May 13, 1952)

[51 Cal. P.U.C. Reports 711—Heading notes and appearances omitted.]

OPINION

Under the date of February 24, 1950, Southern Pacific Company, in conformity with the provisions of the Commission's General Order No. 27-A, filed a notice of the company's intention to discontinue passenger trains Nos. 246, 229, 244 and 243, between Oakland Pier and Sacramento. The Commission, after consideration of that notice, advised the company of its rejection and directed it to continue the service and file a formal application. The application was filed April 15, 1950, requesting authority to discontinue the operation of those trains between Oakland Pier and Sacramento. Trains Nos. 246 and 229 operate daily except Suundays and holidays, and the other two trains operate Sundays and holidays only. The scheduled departures of the Sunday and holiday trains from Oakland Pier and from Sacramento are 30 minutes and 10 minutes later, respectively, than the weekday pair of trains, the arrival times being the same. These trains, hereinafter considered as only one pair, when taken together and in conjunction with the company's ferry service between Oakland Pier and San Francisco, provide a daily round-trip service between Sacramento and San Francisco and intermediate rail points.

A public hearing in this application was had before Commissioner Craemer and Examiner Paul on July 6, 1950, and the matter was submitted. Thereafter, on September 27, 1950, the Commission issued an order reopening the application for further hearing and also instituted an investigation on its own motion (Case No. 5234) to inquire into the sufficiency of passenger train service rendered by Southern Pacific Company [18] between San Francisco, Sacramento and

[18] Throughout this opinion, Southern Pacific Company generally will be referred to as the company.

Los Angeles and all points intermediate thereto on both the Coast and the Valley lines. The two proceedings were consolidated and a public hearing was had at Sacramento before Commissioner Craemer and Examiner Paul on April 26 and September 20, 1951. On the latter date the application and that portion of the investigation (Case No. 5234) having to do with service by respondent between San Francisco and Sacramento were submitted for decision. The remainder of the investigation was continued for further hearing.

At the present time, the company operates eight pairs of passenger trains between these points, one pair of which is devoted principally to mail and express traffic. These trains include the City of San Francisco and the Overland, which serve only the San Francisco Bay area and Sacramento of the points involved herein. Passengers desiring to use the City of San Francisco must secure seat reservation in advance of departure time and pay a service charge of one dollar and twenty-five cents. A reservation, for which there is no extra charge, must be secured in [712] [19] advance of departure time in order to be assured of a seat on the Overland. The running time between San Francisco and Sacramento of these eight pairs of trains varies from two hours and fifteen minutes to three hours and forty minutes. The trains which the company would retain would continue to operate as presently scheduled.

In support of the authority sought, the company produced oral and documentary evidence through a number of its operating officials. One of these officials testified, in substance, that for the last 30 years, except during the war period, there had been a steady decline in short-haul railroad passenger traffic despite the constant increase in population of California. He expressed the opinion that this had been brought about by the increased use of private automobiles, passenger stage lines and common carrier airlines. He drew a comparison between the years of 1950 and 1940, which indicated that the population of the State and the registration of private automobiles had increased approx-

[19] Numbers in brackets indicate pages of the official printed report.

imately 50 per cent and 43 per cent, respectively. The registration of automobiles, according to the witness, was in the proportion of approximately one car to each two and one-half persons in California. While the company's system passenger gross revenue is substantially greater than it was in 1940, local rail passenger traffic, other than commutation traffic, has declined sharply. The witness further testified that schedules of competing passenger stage lines between San Francisco and Sacramento by 1950 had increased approximately 60 per cent over the year 1940. Diversion of local passenger traffic from rails to highways has been due largely to the improvement of highways and the convenience of the private automobile. It was his opinion that the rapidly increasing use of private automobiles has rendered local rail passenger service, aside from local commutation service, almost obsolete. The witness further stated that since the close of the war, the company has spent approximately 36 million dollars on new passenger train equipment to be used in long-haul operations since it had been more successful in holding that traffic in competition with other common carriers and particularly against the private automobile. At this time, none of the local passenger trains operating between the San Francisco Bay area and Sacramento is earning sufficient revenue to meet its operating expenses. Only two pairs of such local trains, the Senator and the El Dorado, are handling any appreciable volume of business between these points, according to the witness.

The company's general passenger agent gave a detailed description of the competing common carrier service by highway and by air and described the various methods used in an asserted endeavor to regain local passenger traffic which had not been successful. The company's manager of mail and express traffic testified that the United States mail formerly handled by the trains proposed to be discontinued is now being [713] carried on other trains and that other headend traffic would receive similar service if discontinuance should be authorized.

The company's research bureau engineer estimated the annual loss from the operations of the Statesman-Governor

to be $151,785 based on operation of the trains during the months of April and May, 1950. However, discontinuance of these trains, he stated, would result in an annual saving to the company of a minimum of $102,209 as it was anticipated that some of their revenue would accrue to other trains.

Other company witnesses testified to the actual and allocable direct labor costs, the number of passengers transported between San Francisco and Sacramento, the financial results of passenger train operations within the state, the operating ratios thereof and other relevant matters (Exhibits Nos.[20] 3 and 11).

Several protestants representing various cities, counties, civic groups and employees' unions opposed the company's request to discontinue the operation of the Statesman-Governor. The only evidence developed by these protests was through participation in the examination of the various witnesses.

The City of Dixon took the position that under the company's plan the city would be deprived of adequate passenger train service for passengers and express. The Statesman-Governor serve that city at noontime and mid-afternoon.

Some protestants were critical of the company's asserted failure to keep abreast of the times and improve passenger train service by modernization of equipment and of local trains, adjustment of schedules to meet the public needs and to develop better solicitation of traffic through advertising and other methods. Opinions were expressed that all facilities should not only be retained but improved to meet present day requirements. Others were apprehensive that elimination of the trains as proposed would be a backward step and would be detrimental to business at the various intermediate towns and communities served.

During 1951, the Engineering Division of the Commission's Transportation Department made an exhaustive study

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[20] Exhibit No. 5 by the Commission's staff contained results of a two-day check of passenger traffic on the Statesman-Governor which showed that a substantial part of that traffic consisted of employees of the company or members of their families traveling on passes.

of the rail passenger service of Southern Pacific Company between San Francisco, Oakland and Sacramento. A report based on this study was received in evidence as Exhibit No. 6 and later supplemented by Exhibit No. 14.

A supervising transportation engineer of the Commission's staff explained those exhibits. He stated that the company operates passenger service between San Francisco and Sacramento by means of a ferry between San Francisco and Oakland Pier, a distance of 3.5 miles, thence by double track railroad controlled by automatic train controls or block [714] signals from Oakland Pier to Sacramento, a distance of about 88.5 miles. The company's Sacramento terminal is about 10 blocks from the State Capitol. The rail line to Los Angeles diverges at Martinez and the line to northern California points and to Portland diverges at Davis.

Exhibit No. 6 reveals that, in addition to its through trains, the company operates three pairs of passenger trains between Oakland Pier [21] and Sacramento, which provide a daily local service between San Francisco and Sacramento. These three trains are:

No. 223 and 224—The Senator
No. 247 and 248—The El Dorado
No. 229 and 243—The Governor (westbound), and
No. 244 and 246—The Statesman (eastbound)

The Sierra (trains Nos. 241-245) operates westbound only and primarily for mail and express, although it carries a number of passengers on Friday and Sunday evenings. It leaves Sacramento at 7:40 p. m. on weekdays and 8 p. m. on Sundays. The Sierra's counterpart is train No. 26, the Sparks Local.

The schedules of the Senator and the El Dorado are arranged so that residents of San Francisco or Sacramento

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[21] All passenger trains arriving at or departing from Oakland Pier have connecting ferry service to and from the San Francisco Ferry Building at the foot of Market Street. However, late arrival of westbound passenger trains at the Oakland Pier often result in passengers missing the scheduled connecting ferryboat for San Francisco.

may leave either city in the morning, spend the full day at destination and return that evening. The Governor-Statesman provides a midday service between the two cities and serves all intermediate rail points. The witness stated that from his observations the running times of those trains are reasonable and that the speeds cannot be materially increased without elimination of stops or of headend business except for trains Nos. 229 and 241 which seem to be unnecessarily slow.

The Commission's engineer also testified that in addition to the company's service between San Francisco and Sacramento, passenger transportation service is provided by Pacific Greyhound Lines and Burlington Transportation Company, passenger stage lines, by Western Pacific Railroad, United Air Lines and the Southwest Airways.

Exhibit No. 14 shows that the week-day schedules of these carriers as of September 15, 1951, as compared to those on the preceding March 1, were the same with the exception of Pacific Greyhound Lines and United Air Lines. The former had increased its local schedules between those dates from 19 to 25 and its non-stop schedules from three to seven and the latter had increased its schedules from six to eight. Scheduled running time of Southern Pacific Company's local trains varied from two hours and thirty minutes to three hours and forty minutes; those of Pacific Greyhound Lines from two hours and five minutes to three hours and twenty-five minutes. [715]

The witness further stated that the local rail passenger traffic of the company between San Francisco and Sacramento has been steadily decreasing despite the increasing population of such areas which are two of the most important in the state. Available traffic statistics indicate that approximately five per cent of the passenger traffic moving between those areas is transported by Southern Pacific Company, 13 per cent by Greyhound Lines and about 80 per cent by private automobile. The engineers' study showed that the Senator, El Dorado and the Statesman-Governor arrived at the terminals of Sacramento and San Francisco on time on an average varying from 71 per cent to 95 per cent during a period of five consecutive

months, the Statesman-Governor having the best record. The City of San Francisco and the Overland, which are through trains, generally arrived on time eastbound at Sacramento during that period, but westbound, they arrived late at Sacramento and San Francisco about 29 per cent of the time. The Overland arrived on time westbound at those terminals 37 per cent of the time, and the City of San Francisco, 22 per cent.

The passenger equipment operated in local service between San Francisco and Sacramento, according to the witness, is not of modern design, the cars having been built during the period 1911-1926 and were all air-conditioned as of August, 1950. The seats of these cars for the most part are standard straight-back seats with covers on the head rests. They were found to be neat and clean and, in most cases, appeared to have been newly repainted. The Senator and El Dorado are the only local trains to which club cars have been assigned.

None of the local passenger trains operating between San Francisco and Sacramento provide dining facilities except the Senator which provides a so-called "snack lounge" service. Prior to April, 1950, full meals were served on the Senator but, according to the testimony, the service was curtailed in order to reduce the direct losses which were averaging $750 a month.

The Commission's engineer also pointed out that the Southern Pacific rail line between San Francisco and Sacramento is relatively closely paralleled by U. S. Highway No. 40 which is of at least four lane construction between those points with only two relatively short exceptions. He stated that the highway distance from downtown San Francisco to downtown Sacramento is approximately 87 miles which is five miles less than the railroad distance. Tests made by Commission engineers showed that an automobile can be driven between these points in about two hours traveling time at the prevailing rate of speed on the highway. This time compares with two hours and fifteen minutes required by the City of San Francisco, which is Southern Pacific's fastest train and two hours and [716] thirty minutes by the Senator and El Dorado. In the process of

improving this highway the distance between San Francisco and Sacramento has been shortened by approximately 15 miles.

The Commission witness gave further testimony in considerable detail as to the population of various communities involved, the revenue passengers using the service of the Statesman-Governor, various other modes of travel between the points involved, rail service by the various local trains of the company at points on the line between San Francisco and Sacramento, a description of the volume, origin and destination of headend traffic transported by the Statesman-Governor and the decline in the local revenue passenger traffic between San Francisco and Sacramento and intermediate rail points. The witness pointed out that the annual loss of the pair of trains which the company desires to discontinue amounted to $105,756 for the 12-month period ending March 31, 1951, and that the total annual loss from the operation of all the local passenger trains between San Francisco and Sacramento is approximately $275,000.

The Commission's staff made a study of the operations of the Senator, El Dorado and the Statesman-Governor on five possible bases and one additional basis of operation for the latter train. This study was made to determine (1) for the year 1952 the approximate results of operation of those trains as presently operated, and (2) the operating results, with required new investment, and other elements by using any of the following:

(a) diesel locomotives and standard cars;
(b) diesel locomotives and streamlined cars;
(c) diesel locomotives and streamlined cars with one extra round trip, or
(d) self-propelled railway passenger cars with one extra trip.

It was pointed out that the smallest loss estimate would be by operations using self-propelled railway passenger cars.

Conversion of the Statesman-Governor from steam locomotives and standard cars to a self-propelled passenger car operation would require a minimum investment of approximately $140,000 for each car and about $10,000 for spare

parts. The operating crew of one car would consist of three men. According to the study (Exhibit 14), use of a self-propelled railway passenger car with the present level of passenger traffic would reduce the net annual operating loss experienced by the Statesman-Governor from approximately $105,000 to approximately $19,000. The car considered would have a seating capacity of 90 passengers and no provisions for headend traffic. However, it was estimated that a large proportion of the present headend traffic of that train would be handled by other trains. [717]

The Commission witness stated that consideration should be given to the substitution of modernized refurbished passenger cars for old coaches now assigned to certain trains in the San Francisco-Sacramento service. He said that in 1949 the company modernized a number of standard coaches by removing the old seats and installing individual reclining seats with foam-rubber cushions and adjustable footrests identical with those installed in modern streamlined equipment. The cost was said to have been approximately $9,300 per car in 1949 which included the installation of rubberized flooring.

While an analysis of the evidence adduced in these proceedings shows that the trains operating in local service between San Francisco and Sacramento do not produce sufficient revenue to offset the cost of their operations, it emphasizes the fact, and we so find, that Southern Pacific Company has attempted to maintain this service with outmoded equipment which was relegated to the service when it became outmoded and uneconomical in the service where it was originally used. The record is quite clear that the company has made but a minimum attempt to modernize its equipment and has failed to bring its service up to date between those points. The only effort that has been made in rehabilitating this equipment has been the air-conditioning and painting of old, outmoded and outdated cars. Little has been done to make the service attractive to the riding public. It is an obligation of a transportation company to keep abreast of the times and to provide the best possible type of transportation facilities and service to the public. While it may be that some services provided by the company

fail to produce sufficient operating revenue to offset the cost thereof, we are concerned with the public interest and the system service as a whole in the State of California.[22] Whether the local passenger service between the points here involved be provided by use of modern type self-propelled railway passenger cars, dieselized and streamlined equipment, or other types of modern equipment, are matters which, in the first instance, are properly within the province of management. However, while the record shows the company has made certain studies designed to improve the service no definitive results have been achieved. Therefore the Commission will require such action as it deems appropriate herein.

Although the evidence emphasizes the modernization of the highways together with improved and increased use of public and private highway transportation facilities, we believe that the rapid expansion of the population of two of the more important areas of this State has created a demand for and will produce sufficient use of modern rail facilities operated on expedited and frequent schedules. The evidence shows that [718] the fastest schedules for local trains now provided by the company require a minimum of two and one-half hours for the trip between San Francisco and Sacramento as compared to about two hours and five minutes for the same trip by private automobile or passenger stage line. We believe that a readjustment of schedules of the local passenger service between the points involved can and should be made to shorten the time in transit. To that end the Commission expects the company to give consideration to reorganization of its methods of handling the headend traffic on its local trains in order to provide a more expeditious and inviting passenger service between San Francisco and Sacramento. We believe the Southern Pacific Company as a common carrier has a public duty and obligation to provide this type of service.

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[22] Monthly operating reports of revenues and expenses of Southern Pacific Company filed with this Commission pursuant to the provisions of General Order No. 65 show system net railway operating income of $45,381,528 after allowances for taxes and rents for the year 1951.

The evidence presents a picture of an antiquated method of handling passengers by a combination of rail and ferry facilities. The ferry portion of the service is attractive, but for local passengers it causes delay, inconvenience and seriously handicaps the attractiveness of this service. The record shows that an uncompleted study has been made by the company over a period of years with respect to the use of automotive equipment between San Francisco and certain of its East Bay stations in conjunction with railway passenger service. This study should be completed as expeditiously as possible and a report of the results thereof made to the Commission.

After full consideration of all the evidence in these proceedings, the Commisison finds that Southern Pacific Company has not justified its request to discontinue the passenger service provided by operations of trains Nos. 229, 243, 246 and 244 (the Statesman-Governor). Therefore, the Commission further finds that the public interest requires that Southern Pacific Company shall discontinue operations of said trains Nos. 229, 243, 246 and 244 by use of steam locomotives and standard railway passenger equipment, and shall substitute in lieu thereof passenger service by modern self-propelled railway passenger cars. The Commission further finds that the railway passenger equipment used in the operation of trains Nos. 223 and 224 (the Senator) and trains Nos. 247 and 248 (the El Dorado) shall be further modernized by the installation of individual reclining seats with foam rubber cushions, adjustable footrests, installation of rubberized floor coverings, and refurbished to a standard comparable to modern railway passenger equipment.

The Commission further finds from the evidence in these proceedings that the public interest requires that the company shall make a study, and prepare and submit to the Commission a plan for an improved and expedited transbay automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service. The Commission [719] further finds it to be in the public interest that the company shall make a study, pre-

pare and submit to the Commission a plan for the modernization of its Oakland Pier passenger terminal facilities.

Order

A public hearing having been held in the above-entitled matters, the Commission being fully advised therein, and based upon the conclusions and findings expressed in the foregoing opinion,

It is ordered as follows:

(1) That Southern Pacific Company shall within one hundred twenty (120) days after the effective date hereof discontinue passenger train service provided by trains Nos. 229, 243, 246 and 244 (the Statesman-Governor) by the use of steam locomotives and standard railway passenger equipment, and shall substitute in lieu thereof railway passenger service by modern self-propelled railway passenger cars.

(2) That within one hundred twenty (120) days after the effective date hereof, Southern Pacific Company shall assign equipment, for use in trains Nos. 223 and 224 (the Senator) and trains Nos. 247 and 248 (the El Dorado), which has been fully air-conditioned and further modernized by the installation of invidividual reclining seats with foam rubber cushions, adjustable footrests, installation of rubberized floor coverings and refurbished to a standard comparable to modern railway passenger equipment.

(3) That, within sixty (60) days after the effective date hereof, Southern Pacific Company shall make a study and prepare and submit to the Commission a plan for establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service.

(4) That, within sixty (60) days after the effective date hereof, Southern Pacific Company shall make a study and prepare and submit to the Commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 13th day of May, 1952.

R. E. MITTELSTAEDT,
President;
HAROLD P. HULS,
PETER E. MITCHELL,
Commissioners.

I dissent.

The record in my opinion fails to substantiate a finding that public convenience and necessity require the continued operation of trains Nos. 246, 229, 244 and 243 (Statesman-Governor). [720]

Approximately 80 passengers patronized these two trains daily. Their direct operating cost per year totals $168,000, and the overall direct revenue is $63,000. There are adequate alternate means of public transportation available for these passengers.

The trains for which authority to abandon is being sought operate at an annual deficit of approximately $105,000 according to the most conservative estimate. The remaining local trains between San Francisco and Sacramento which the company does not propose to abandon also are operating at a deficit, which was estimated by the Commission's staff to be $170,000 annually. These losses are further increased by the fact that subsequent to the submission of this case the United States Post Office Department made arrangements to carry its San Francisco-Sacramento mail by highway carriers and a further loss in revenue of approximately $150,000 annually will be experienced by this carrier.

It is plain from the record that the company is faced with a competitive situation which is most difficult and does not lend itself to ready solution. The rail service between San Francisco and Sacramento has two very serious natural disadvantages; one being the fact that trains have no direct means of access into the city of San Francisco but must rely upon either ferry boats or highway carrier connections in order to cross San Francisco Bay, and secondly, the alignment of the rail route traversed between Oakland Pier and Martinez is such as to compel restricted speed in operation.

On the other hand the highway competitors, both passenger stages and automobiles, operate over a high-speed highway directly connecting the two cities. A substantial portion of the highway between San Francisco and Sacramento is constructed to freeway standards and is being improved yearly so that in spite of steadily increasing volume of traffic, travel on this highway becomes easier each successive year. Consequently passenger stages and automobiles can cover the distance between the two cities in shorter time than can the fastest train operated by Southern Pacific Company. The record shows that of the total number of passengers moving between San Francisco and Sacramento, approximately 80% travel by automobile and 13% by passenger stage and the remaining 7% by rail and air carrier.

Substitution of a self-propelled Diesel car for the "Statesman-Governor", as contemplated by the majority decision, will not result in a materially expedited service between the terminal cities of San Francisco and Sacramento unless stops at the intermediate cities, such as Crockett, Martinez, Fairfield, Elmira, Dixon, and Davis are eliminated. A considerable portion of those patrons using these trains today are either destined to or originate at the intermediate cities named above.

None of the proposals will eliminate the deficits which of necessity thus continue as a burden on other traffic and on the rate payers. [721]

I do, however, concur with the majority that the equipment on the remaining local trains, namely the "Senator" and the "El Dorado", be refurbished so as to be more attractive to the traveling public.

JUSTUS F. CRAEMER,
Commissioner.

I concur in the dissent.

Additionally, I am of the opinion that the order for improved service is premature with regard to Bay Area terminal facilities. Case 5234 contemplates an investigation of several other lines of the Southern Pacific which terminate at Oakland Mole, and it is quite probable that a com-

pletion of the investigation would point to a different solution of the problem of terminal facilities in the Bay Area.

Furthermore, I am of the opinion that capital expenditures for new and modern equipment should be directed to service now favored by the traveling public, rather than to the service which that public has practically abandoned.

KENNETH POTTER,
Commissioner. [722]

APPENDIX C

Decision No. 47276, Application No. 31304

Case No. 5234

(June 17, 1952)

OPINION AND ORDER MODIFYING DECISION AND DENYING REHEARING

The Southern Pacific Company, applicant and respondent in the above-entitled consolidated proceedings, has filed its petition for rehearing and has urged many objections respecting Decision No. 47161 rendered by the Commission herein under date of May 13, 1952. Petitioner asks the Commission to set aside and annul said decision.

The points made by petitioner, in essence, are the same as those made by it on the submission of this matter but said points are somewhat elaborated and, in addition, incidental and subsidiary points are injected into its petition for rehearing.

The Commission has carefully considered the petition for rehearing and is of the opinion that petitioner has not demonstrated therein, or otherwise, that the Commission has committed any error in Decision No. 47161. Petitioner appears to experience difficulty in understanding the principles of regulation underlying said decision and alleges that proper findings are not included in said decision and that the periods of time within which petitioner is required to perform certain acts are far too short for the performance thereof. Petitioner raises the ancient contention that the

decision of the Commission invades the province of management and substitutes Commission judgment for the lawful judgment which management is entitled to exercise. The further contention is made that there is no finding, and no evidence to support such finding if made, that public convenience and necessity requires the continuation of the service performed by passenger trains Nos. 229, 243, 246 and 244, sought to be abandoned, and that public convenience and necessity requires the improvement of that service and the equipment and facilities used in performing the same, or that public convenience and necessity requires the other improvements directed to be made in connection with other service, equipment and facilities of petitioner. It, also, contends that there is no justification for requiring the studies and reports to be made, which said decision requires petitioner to make. Lastly, petitioner asserts that said decision denies to it certain constitutional guaranties.

As to the contention that the periods of time are not sufficient within which petitioner could perform the acts required, we point out that petitioner well knows that it may request extensions of such periods of time and that the Commission will grant such extensions upon a reasonable showing of the necessity therefor. The record in this case convinces us that it is not the time element that presents difficulty to petitioner but the absence of the will on the part of petitioner to perform its public duty relating to the matters and things which the decision, herein, orders petitioner to do and perform.

We are of the opinion that the decision herein is valid and lawful and fully informs petitioner as to what it is ordered to do but, in light of the fact that petitioner appears to misunderstand the provisions of said decision and in order to clarify said decision so that no possible misunderstanding may be said to exist, we make the following additional findings;

The Commission hereby finds:

1. That public convenience and necessity requires that the passenger service now performed by trains

Nos. 229, 243, 246 and 244 be continued and that said service be improved by substituting self-propelled railway passenger cars, as required by Decision No. 47161, for the equipment now used in performing said service, the Commission hereby further finding that the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient.

2. That public convenience and necessity requires the improvement of the passenger service performed by trains Nos. 223 and 224 and 247 and 248 and the improvement of the equipment and facilities now used in performing such service, as in Decision No. 47161 ordered and directed, the Commission hereby further finding that said service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient.

3. That the petitioner, having the ability so to do, has failed to discharge its public duty by failing to make the foregoing described improvements of service, equipment and facilities, which failure on petitioner's part requires the exercise by this Commission of its supervisory powers to require petitioner to discharge its public duty in this regard.

4. That the improvement of service, equipment and facilities required by Decision No. 47161 will not constitute an undue financial or other burden upon petitioner.

5. That public convenience and necessity requires that petitioner make the studies and reports required by Decision No. 47161 and the Commission further finds that petitioner has failed to discharge its public duty by its failure in the past to investigate fully and comprehensively those matters and things which said decision requires it to investigate and report on. The Commission also finds that operations, service, equipment and facilities concerning which said studies and reports are to be made are inadequate and insufficient and that public convenience and necessity requires the improvement thereof.

Decision No. 47161 is Hereby Modified by the inclusion therein of the foregoing findings of fact and the petition for rehearing, herein, is hereby denied.

Dated, San Francisco, California, this 17th day of June, 1952.

R. E. MITTELSTAEDT,
President;
HAROLD P. HULS,
PETER E. MITCHELL,
Commissioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 486

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, KENNETH POTTER, PETER E. MITCHELL and VERNE SCOGGINS, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motion to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, KENNETH POTTER, PETER E. MITCHELL and VERNE SCOGGINS, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motion to Dismiss or Affirm

A statement in opposition to jurisdiction and a motion to dismiss or affirm have been served by the Public Utilities Commission of the State of California and its individual members, appellees above named, herein collectively referred to as "the Commission." Appellant submits this brief in reply and opposition to that motion, as contemplated by Rule 7(3) of the Rules of this Court.

Appellant replies to various statements made by the Commission respecting the questions in this appeal, by summarily defining those questions. They are:

1. The validity, under the federal Constitution, of that portion of the Commission order requiring appellant to use self-propelled equipment, rather than non-self-propelled equipment, on a deficit-producing passenger train making a single daily trip of 88 miles in each direction, when the substitution of equipment is supported by absolutely no showing of public need, and will require an investment of some $450,000.[1]

2. The validity, under the federal Constitution, of that portion of the Commission order requiring appellant to continue to operate a deficit-producing passenger train for which there is no public need.

3. The validity, under the federal Constitution, of the limited scope of judicial review of constitutional factual questions accorded under the California statutory procedure, as construed by the California Supreme Court.[2]

---

1. The Commission order does not specify the number of self-propelled cars which appellant would be required to acquire in order to make the prescribed substitution of equipment. The Commission, however, in its motion refers to "approximately three cars being sufficient" (p. 10 of typewritten manuscript). We do not necessarily accept this construction of the Commission order but in this brief will use that figure as providing a measure of the investment required: three cars at the estimated cost of $150,000 per car would require $450,000.

2. This appeal does not involve those portions of the Commission order requiring appellant to make certain studies respecting the establishment of automotive passenger service between San Francisco and Oakland or the improvement of its Oakland Pier terminal facilities. Nor does this appeal involve any question as to the power and authority of the Commission under the statutes and Constitution of the State of California, as alleged in the Commission's motion.

Questions "1" and "2" have a common legal basis (the alleged violation of the Commerce Clause of, and of the Due Process Clause of the Fourteenth Amendment to, the federal Constitution), but they are otherwise separate and distinct. Even assuming, *arguendo,* that the Commission order requiring the continued operation of the train is valid, we submit that the portion of the order requiring the substitution of self-propelled for non-self-propelled equipment is still invalid. The Commission in its motion, however, fuses these two questions and treats the validity of the portion of the order requiring the substitution of self-propelled equipment as ancillary and subordinate to the validity of the portion of the order requiring the continued operation of the train. Therefore, in order to bring into sharp focus the separate and distinct character of these two questions, we have listed them separately above and will so discuss them.

1. The Commission Order Requiring Appellant to Use Self-Propelled, Rather Than Non-Self-Propelled, Equipment Constitutes an Undue Burden on Interstate Commerce and Deprives Appellant of Its Property Without Due Process of Law.

The record contains absolutely no showing of any public need for the use of self-propelled equipment rather than non-self-propelled equipment on the train concerned, and yet the acquisition of that equipment, which appellant neither owns nor uses any place on its entire system, would require an investment of $450,000 and result in an operation at a substantial loss.

The California Supreme Court in its decision, however, states that the Commission, in concluding that self-propelled cars should be substituted for non-self-propelled cars "took the view" that such equipment "would materially expedite

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service between the terminal cities and would probably result in an increase in revenue."

As pointed out at length in appellant's jurisdictional statement, the Commission decisions contain no such statement, and the evidentiary facts do not support such a statement. In apparent recognition that this is so, the Commission in its motion does not even suggest that the use of self-propelled equipment would either expedite service or attract additional patrons so as to increase appellant's revenues.

The Commission in its motion rather refers only to the finding in the Commission decision that the "equipment ordered to be replaced" was "old, outmoded, and outdated." If the Commission thus intends to infer that the prescription of "self-propelled" equipment was justified because all non-self-propelled equipment is "old, outmoded, and outdated," that inference is contrary to the fact that the railroads in general, and appellant in particular, operate, on many trains, non-self-propelled equipment which is of the newest and most modern character. Since World War II appellant has acquired 189 new, lightweight, streamlined cars and 80 new diesel electric locomotive units for its passenger service. Therefore, the Commission's finding that the present equipment is old, outmoded and outdated provides no evidentiary basis for the Commission's conclusion that there is a public need for the substitution of self-propelled for non-self-propelled equipment. As pointed out in our jurisdictional statement, the absence of that public need is affirmatively revealed by the fact that not a single member of the traveling public—or, for that matter, any other person—appeared to urge the use of this type of equipment, and the Commission's own staff of experts, who introduced evi-

dence in the record, specifically refrained from making any definite recommendation as to what type of equipment should be used (T. 316-317).[3] Thus, the Commission order requiring appellant to use self-propelled rather than non-self-propelled equipment appears to rest, not on any public need, but rather on the mere whim and caprice of a bare three-member majority of the five-member Commission.

The Commission in its motion contends that the order in issue has no substantial impact upon appellant. That contention lacks merit. The self-propelled equipment which the Commission prescribes for use on one train making a daily trip of but 88 miles in each direction is incompatible with the passenger equipment used by appellant on its many interstate and other intrastate trains. That other equipment consists entirely of non-self-propelled equipment which may be readily interchanged to meet emergencies and changing traffic patterns. Self-propelled cars cannot be used to provide motive power to move non-self-propelled cars; their motive power can be used only if they are run separately or in trains consisting entirely of self-propelled cars (T. 301).

The Commission's order also has a substantial impact upon appellant because it requires an investment of $450,000 of new capital. The Commission intimates in its motion that this investment should not be regarded as a burden, because it would result in a reduction (though not an elimination) of appellant's operating loss on the train concerned. But this alleged benefit to appellant is to be weighed against the required outlay of the $450,000 of new capital for equipment which is to be used on one train making a daily trip of 88

3. Transcript and exhibit references "T." and "Ex." are to the record made before the Commission.

miles in each direction and which is incompatible with any of appellant's other passenger equipment. The determination of whether such a questionable investment of new capital will or will not inure to appellant's benefit is one that can best be determined by appellant's directors and officers, particularly when it appears without question that the public stands to receive no benefit from the investment. And, even if this investment of $450,000 were to be made, it is conceded by the Commission that the operation of the train with the new equipment would still result in appellant sustaining an out-of-pocket loss of at least $19,000 per year. Moreover, this substantial financial impact would be directed against appellant's already financially sick passenger business: appellant in 1950 had a system passenger deficit of $34,663,361 and an estimated deficit from all of its passenger service conducted within California of $10,291,801 (T. 332-333, 367).[4]

Such state regulatory action, unsupported by public need and having a substantial financial impact upon an interstate rail carrier, definitely constitutes an undue burden on interstate commerce. The Commission in its motion contends,

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4. In the last analysis, the dollar amount of the financial impact is not actually material in determining the constitutionality of the order. The following quotation from the dissenting opinion of Justice Frankfurter (joined in by the late Chief Justice Vinson, and also Justice Jackson and Justice Burton) in a tax case is just as applicable here in a case involving state regulation (*Memphis Natural Gas Co. v. Stone* (1948), 335 U.S. 80, 103-104):

> "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one'. And even in these days, an unconstitutional exaction by a State of $3,400 is not *de minimis.*"

On the point thus discussed by Justice Frankfurter, there appears to have been no conflict between the views expressed and those of the majority.

however, that there can here be no undue burden on interstate commerce because the passenger train to which the Commission's order is directed has only an intrastate operation. But it is well established that state regulation of intrastate activities may constitute an undue burden on interstate commerce. This Court so recognized in *Colorado v. United States* (1926), 271 U.S. 153, that the furnishing of intrastate service at a deficit may lead to higher interstate rates and to a waste of a carrier's resources necessary to enable it to serve interstate commerce and therefore burden interstate commerce. The Court said (p. 163):

> "Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce."

See, also, to the same effect, *Davis v. Farmers Co-Operative Co.* (1923), 262 U.S. 312, 317, in which this Court held invalid, as an undue burden on interstate commerce, state action directly regulating no interstate commerce but only requiring an interstate carrier to submit to litigation by a non-resident plaintiff on a cause of action arising elsewhere. This general principle that an undue burden on interstate commerce may result from the regulation of intrastate activities by reason of the financial impact of that regulation has been specifically applied to orders of state commissions affecting only intrastate trains. *Chicago, B. & Q. R. Co. v. Illinois Com. Commn.* (D.C.N.D., Ill., 1949), 82 F. Supp. 368, 376; *Pennsylvania-Reading Sea. Lines v. Board of Pub. Util.* (1950), 5 N.J. 114, 74 A.2d 265, 272-274, cert. den. 340 U.S. 876.

As pointed out in appellant's jurisdictional statement, not only does the Commission's order violate the Commerce Clause of the federal Constitution in general, but it also violates the National Transportation Policy (49 U.S.C., preceding Sec. 1; 54 Stat. 899) in particular. That Congressional policy of promoting economical and efficient service and fostering sound economic conditions in transportation is clearly violated by state regulatory action requiring an interstate rail carrier to spend $450,000 for a specific type of equipment for which there is no public need when that equipment is to be used on a train operated at an out-of-pocket loss and is incompatible with the other equipment used by the carrier on its many other interstate and intrastate passenger trains. Contrary to the contentions advanced by the Commission in its motion, the National Transportation Policy enacted in 1940 does modify the pre-existing picture and limit the extent the states might otherwise validly burden interstate commerce. For this Court has specifically held that state laws which violate that policy or earlier similar declarations of policy must be stricken down as undue burdens on interstate commerce. *Southern Pac. Co. v. Arizona* (1945), 325 U.S. 761, 773, 783-784; *Davis v. Farmers Co-Operative Co., supra*, 262 U.S. 312, 317. Moreover, in *Chicago, B. & Q. R. Co. v. Illinois Com. Commn., supra*, 82 F. Supp. 368, 376, a three-judge federal district court held that a Commission order affecting a purely intrastate passenger train specifically violated the National Transportation Policy.

The Commission in its motion quotes from this Court's decision in *Alabama P. S. Commn. v. Southern Ry. Co.* (1951), 341 U.S. 341, as supporting its contention that the

National Transportation Policy affords no guide in determining whether state action invalidly burdens interstate commerce. Clearly, that decision is open to no such construction. Aside from the fact that the Court did not pass upon the constitutionality of the state regulatory order concerned, the carrier did not there urge that the order violated either the Commerce Clause in general or the National Transportation Policy in particular.

The same lack of public need for the substitution of self-propelled cars for non-self-propelled cars results in the Commission's order depriving appellant of its property without due process of law. As broad as the state police power may be, it cannot be exercised to require a carrier to make a substantial expenditure of money when that expenditure is supported by no public need but is the result only of the whim and caprice of state officials. In *Oregon R. & N. Co. v. Fairchild* (1912), 224 U.S. 510, this Court held that a state commission order requiring a railroad company to make a capital expenditure for the construction of a switch connection violated the Due Process Clause of the Fourteenth Amendment to the federal Constitution and was thus invalid because there was a lack of any public need for the construction.

If there were ever state regulatory action that was so unsupported by evidence and a rational basis as to be arbitrary, it is this action of the Commission in specifying that the cars used on the train concerned should be "self-propelled." Indeed, it would have been no more arbitrary if the Commission had ordered appellant to equip the train with cars having a green color or furnished with teakwood chairs, in the absence of any public need therefor.

2. The Commission's Order Requiring Appellant to Continue Operation of the Train, With Either Self-Propelled or Non-Self-Propelled Equipment, Constitutes an Undue Burden on Interstate Commerce and Deprives Appellant of Its Property Without Due Process of Law.

As demonstrated at length in appellant's jurisdictional statement, the evidence of record shows no public need for the continued operation of the train with either self-propelled or non-self-propelled equipment.

The only evidence received in the record which is referred to by the California Supreme Court in its opinion as showing a public need consists of a resolution of the City Council of Sacramento protesting the discontinuance of the train (Ex. 7), testimony by the Sacramento City Manager that he felt that the train should not be discontinued (T. 256), and a statement on behalf of the City of Richmond protesting the discontinuance of the train (T. 118). As stated in appellant's jurisdictional statement, "Such mere statements objecting to the discontinuance of the train and hopeful expressions that it will not be discontinued are not evidence of public need."

In apparent recognition that these protests have no evidentiary value, the Commission makes no reference to them in its motion. Instead, the Commission states:

> "* * * the operation in question is between the State Capital and one of the largest metropolitan areas in the second largest State in the Union, and operating through communities which have increased their population by 50% in the last ten years."

The relative importance of the points concerned is no evidence of any need for the train. Evidence of that need is, rather, the use made of the train by the public and the

availability of other transportation service between those cities. That other transportation service consists of appellant's 13 other daily trains in each direction, seven of which provide train service the entire distance between San Francisco and Sacramento, as well as the daily train service of the Western Pacific Railroad Company and frequent bus and airplane service.

Furthermore, the immateriality, on the question of public use and, hence, public need for the facilities, of the population increase in the past decade is shown by the evidence that the number of passengers using all of appellant's trains between San Francisco and Sacramento has since 1946 been continually decreasing by approximately 15 per cent per year (T. 265). It is also established by the evidence that improvements in the highway facilities for competing automobile and bus traffic have more than kept pace with the population growth. The studies of the Commission's own staff, placed in the record by the Commission, contain the following statements (Ex. 6, pp. 23, 24):

> "The Southern Pacific service is paralleled between San Francisco and Sacramento by an excellent highway, U. S. Route 40.
>
> * * * * * * *
>
> The highway is of at least four lane construction over almost its entire length.
>
> * * * * * * *
>
> This highway has been progressively improved during the past years so that today it is easier and faster to drive than it was at the close of the war in 1945, in spite of the increasing volume of automobile traffic."

The Commission, in discussing the question of public need, also makes, in effect, a plea of confession and avoid-

ance: the Commission contends that the reason the public does not use the train is that appellant has failed to modernize the train. This contention is devoid of evidentiary support and is contrary to the studies of the Commission's own staff, which candidly state (Ex. 6, p. 26):

> "It is our belief that the improvements in the highway and the corresponding increase in the utility of the private automobile has been a most important factor in the decline in rail patronage between the two cities [San Francisco and Sacramento]."

The common-carrier bus service between San Francisco and Sacramento, which is not only frequent but also faster than appellant can possibly provide, was also attributed by the Commission's staff as making appellant's train service no longer "acceptable to the traveling public" (T. 228). As stated by Public Utilities Commissioners Craemer and Potter in their dissent to the Commission order:

> "It is plain from the record that the company [appellant] is faced with a competitive situation which is most difficult and does not lend itself to ready solution. The rail service between San Francisco and Sacramento has two very serious natural disadvantages; one being the fact that trains have no direct means of access into the city of San Francisco but must rely upon either ferry boats or highway carriers connections in order to cross San Francisco Bay, and secondly, the alignment of the rail route traversed between Oakland Pier and Martinez is such as to compel restricted speed in operation. On the other hand the highway competitors, both passenger stages and automobiles, operate over a high-speed highway directly connecting the two cities."

While the Commission's motion contains the bald statement, "The record contains sufficient evidence to amply support the findings of the Commission," it makes no further reference to what this "sufficient evidence" is. Rather, the Commission suggests that it may have drawn that evidence from "its experience and informed judgment." This suggestion is contrary to the holdings of this Court that an administrative body cannot treat as evidence that which is not introduced as such, or, consistent with procedural due process, make findings of fact not supported by evidence of record. *Interstate Com. Commn. v. Louisville & N. R. Co.* (1913), 227 U.S. 88, 91-94; *United States v. Abilene & So. Ry. Co.* (1924), 265 U.S. 274, 286-290; *Northern Pac. Ry. Co. v. Dept. of Public Works* (1925), 268 U.S. 39, 44-45.

Appellees seek to avoid the result of the above decisions by citing *Market St. Ry. Co. v. Commission* (1945), 324 U.S. 548, 561-562, and *United States v. Pierce Auto Lines* (1946), 327 U.S. 515, 527-530. However, these two cases specifically recognize that an administrative body may never look beyond the record proper where "substantial prejudice is shown to result." *United States v. Pierce Auto Lines, supra,* 327 U.S. 515, 530. Appellant submits that substantial prejudice manifestly would result in this case, where the record so clearly reveals an absence of public need for the continued operation of the train, if the Commission were permitted to make a valid finding of public need on the basis of evidence which is neither in the record *nor even disclosed to the parties or the Court.*

The Commission in its motion attempts to de-emphasize the lack of public need for the continuation of the train by inferring that appellant is here attempting to take action

contrary to the doctrine that the incurrence of an out-of-pocket loss does not constitutionally prevent a State from requiring a rail carrier to render one particular service at an out-of-pocket loss. The Commission states:

> "To carry the contention of appellant to its logical conclusion, this Commission should permit the abandonment of *all* of appellant's intrastate passenger service, save only that small portion of it which, the record shows, earns its out-of-pocket costs, * * *."

Here the Commission misstates appellant's contention. It is not that the Commission's order is invalid merely because it requires the operation of a train at an out-of-pocket loss, but rather because it requires the operation, at an out-of-pocket loss, of a train *for which there is no public need.*

The same established principles which make the portion of the Commission's order requiring the substitution of self-propelled equipment a violation of the Commerce Clause of the federal Constitution and of the National Transportation Policy apply equally to that portion of the order requiring the continued operation of the train. These principles have been discussed, *supra,* pages 8 and 9.

Requiring a rail carrier to continue to operate a deficit-producing train for which there is no public need, in addition to constituting an undue burden on interstate commerce, deprives the carrier of its property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution. In appellant's jurisdictional statement we cited a large number of decisions from other jurisdictions holding that state commission orders requiring the operation of deficit-producing passenger trains, were, in the absence of public need, in violation of the Fourteenth Amend-

ment, even though system operations were profitable.[5] These cases are all recent ones, which expressly take into account the transportation revolution wrought by the development of the motor-bus common carrier, the private automobile and improved highways, and they clearly establish that the California court's view is contrary to the almost unanimous weight of modern authority. The Commission seeks to minimize the effect of these decisions solely by citing a decision of the California Supreme Court[6] which holds that decisions from other jurisdictions under other statutes "are not helpful" in defining the powers of the California Commission. But the cited decision holds merely that rulings in other states as to the statutory power of other commissions under different statutes are not determinative of the statutory power of the California Commission under the different California statute, a question not presented in this appeal. That decision certainly does not hold that decisions in other jurisdictions construing the scope of the power of state regulatory commissions under the federal Constitution are not entitled to great weight in this Court when the power

5. *M-K-T R. Co. v. State* (1941), 189 Okla. 685, 119 P.2d 835, 840; *St. Louis-S. F. R. Co. v. State* (1950), 204 Okla. 432, 230 P.2d 709, 714-716; *Application of Chicago, B. & Q. R. Co.* (*Chicago, B. & Q. R. Co. v. Municipalities of Holdrege*) (1950), 152 Neb. 352, 41 N.W. 2d 157, 161; *Blease v. Charleston & W. C. Ry. Co.* (1928), 146 S.C. 496, 144 S.E. 233, 239; *Hessey v. Capital Transit Co.* (C.A. Md. 1949), 66 A.2d 787, 790; *Pennsylvania-Reading Sea. Lines v. Board of Pub. Util., supra*, 5 N.J. 114, 74 A.2d 265, 272, cert. den. 340 U.S. 876; *Delaware L. & W. R. Co. v. Van Santwood* (D.C., N.D. N.Y., 1914), 216 Fed. 252, 254; *Atlantic Coast Line R. Co. v. Pub. Serv. Commn.* (1948), 77 F. Supp. 675, 686; *Northern Pac. Ry. Co. v. Board of Railroad Commrs.* (D.C. Mont. 1942), 46 F. Supp. 340, 342; *Chicago, B. & Q. R. Co. v. Illinois Com. Commn., supra*, 82 F. Supp. 368, 377.

6. *San Diego and Coronado Ferry Co. v. Railroad Commn.* (1930), 210 Cal. 504, 511, 292 Pac. 640.

of the California Commission under the federal Constitution is squarely in issue. Since this Court is the final arbiter of the meaning of federal constitutional provisions, it is required, in the traditional exercise of its power to review state court decisions on federal constitutional questions, to select that position from among conflicting state court views which is deemed to be the proper one.

The Commission nevertheless contends that under this Court's decision in *Alabama P. S. Commn. v. Southern Ry. Co., supra,* 341 U.S. 341, and certain earlier decisions of this Court,[7] no issue under the federal Constitution arises where a state requires the continuation of railroad service at a financial loss. Aside from the fact that the decision in the *Alabama P. S. Commn.* case did not go to the merits of the constitutional controversy, the dicta contained therein fully support our position that the requirement of service at a loss violates due process in the absence of public need therefor. As the Court put it (341 U.S. 341, 347):

> "The problems raised by the discontinuance of trains 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered."

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7. The Commission cites *Missouri Pac. Ry. Co. v. Kansas* (1910), 216 U.S. 262; *Atlantic Coast Line R. Co. v. N. Car. Corp. Commn.* (1907), 206 U.S. 1; *United Fuel Gas Co. v. Railroad Commn.* (1929), 278 U.S. 300. It also refers to the decisions cited by Justice Frankfurter in his concurring opinion in the *Alabama P. S. Commn.* case, *supra,* 341 U.S. 341, 352, 353. These include, in addition to the above: *Chesapeake & O. Ry. Co. v. Pub. Serv. Commn.* (1917), 242 U.S. 603; *Puget Sound Traction Co. v. Reynolds* (1917), 244 U.S. 574; *Fort Smith Light & Traction Co. v. Bourland* (1925), 267 U.S. 330.

The other above-mentioned decisions cited by the Commission not only relate to an era before the automobile transportation revolution but are clearly distinguishable on their facts. As pointed out in *Atlantic Coast Line R. Co. v. Pub. Serv. Commn.* (1948), 77 F. Supp. 675, 685, they involve situations where the carrier was being required to perform merely an absolute duty rather than a relative duty. In that court's opinion the duty in those cases was absolute either because there was a definite public need for the service or because the carrier was bound by a franchise contractual obligation to provide a specified passenger service. In fact, in most of these cases the carrier proposed to avoid its contractual obligation by furnishing no passenger train service whatsoever between the particular points. Nothing of that sort exists here. There is no contractual obligation to continue to operate the train concerned; and even after the discontinuance of that train the public would still have available 13 daily trains in each direction, seven providing passenger service the entire distance between San Francisco and Sacramento.

3. The California Review Procedure, as Construed to Deprive Appellant of the Right of Independent Judicial Review Upon the Constitutional Factual Question of Public Need, Deprives Appellant of Due Process of Law.

As indicated in our jurisdictional statement, the California Supreme Court construed the California statutory procedure for judicial review of the Commission's decision, as depriving it of the right to exercise its independent judgment upon, and re-examine the evidentiary facts upon, the question of whether there was public need either for the self-propelled equipment or the train service. This question,

as we pointed out, is one of ultimate fact upon which all of our substantive constitutional rights depend—a so-called "constitutional fact" question. It is our contention that, under *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U.S. 287, and subsequent decisions of this Court,[8] such a construction of the California review procedure renders it invalid under the Due Process Clause of the Fourteenth Amendment.

The Commission contends that this rule, while never having been expressly overruled, has been devitalized and rejected by later cases. In support of this position it cites the following language from this Court's decision in *Alabama P. S. Commn. v. Southern Ry. Co., supra,* 341 U.S. 341, and the two other cases there mentioned:

> "The fact that review in the Alabama courts is limited to the record taken before the Commission presents no constitutional infirmity. . . . And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York v. United States,* 331 U.S. 284, 334-336 (1947); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 311 U.S. 570, 576 (1941)."

This contention by the Commission overlooks the distinction between the above rule and the separate but related

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8. *Ng Fung Ho v. White* (1922), 259 U.S. 276, 284; *Prendergast v. New York Telephone Co.* (1923), 262 U.S. 43, 50; *Tagg Bros. & Moorhead v. United States* (1930), 280 U.S. 420, 443-444; *Phillips v. Commissioner* (1931), 283 U.S. 589, 600; *Crowell v. Benson* (1932), 285 U.S. 22, 45-46; *State Corp. Commn. v. Wichita Gas Co.* (1934), 290 U.S. 561, 569; *St. Joseph Stock Yards Co. v. United States* (1936), 298 U.S. 38; *Baltimore & O. R. R. Co. v. United States* (1936), 298 U.S. 349.

rule enunciated in *Crowell v. Benson* (1932), 285 U.S. 22, 63-65. The former rule is that due process (under either the Fourteenth or Fifth Amendments) requires a court reviewing an order of an administrative body to exercise its independent judgment, although on the record made before the administrative body, upon questions of constitutional fact. The rule of *Crowell v. Benson*, on the other hand, is to the effect that in such a situation the reviewing court must go further and hold a complete trial *de novo*, not confining itself to the administrative record. This latter rule is based, not upon due process, but upon the federal doctrine of separation of powers. *Crowell v. Benson, supra*, 285 U.S. 22, 64; 41 Yale L. J. 1037, 1055 (1932); 46 Harv. L. Rev. 478, 482 (1933). The latter rule has been severely criticized, primarily because it has the effect of completely vitiating the efforts of the administrative body on this type of question. Dickinson, *Judicial Review of "Constitutional Fact,"* 80 Penn. L. Rev. 1055, 1061 (1932).

It is plain that this Court in its above statement in the *Alabama P. S. Commn.* case meant to reject only this latter rule and not the doctrine of independent judicial review. Thus, in the immediately preceding sentence the Court was at pains to point out that the Alabama courts had held that "judicial review calls for an independent judgment as to both law and facts when a denial of due process is asserted." This effectually removed any question under the independent judicial review doctrine from the case. Furthermore, since the Court prefaced its above remarks with the phrase "whatever the scope of review," it is evident that the Court did not intend to define the limits of such review or to depart from its previous pronouncements that judicial re-

view properly extended to an independent re-examination of the evidentiary facts respecting constitutional factual issues. In denying that under its decisions any right exists to "relitigate," the Court merely meant that a party can not properly insist upon a complete trial *de novo* upon evidence which it had not, but could have, introduced before an administrative body.

Such is the holding of *New York v. United States* (1947), 331 U.S. 284, 334-336, which is cited by the Court as authority for the above statement, and which is relied upon by the Commission. Such also appears to have been all that the Court actually held in the *Rowan & Nichols* case which is also cited by the Court. There an order of the Texas Railroad Commission with respect to oil proration, which was attacked as confiscatory, was held not to be violative of the Due Process Clause. While the Court did state (311 U.S. 576) that due process "does not require the feel of the expert to be supplanted by an independent view of judges," this was said in a situation where the lower federal court had thought itself compelled to grant a complete trial *de novo*, without even having the record of the administrative tribunal before it. Thus, the Court apparently meant merely that due process did not require application of the *Crowell v. Benson* trial *de novo* rule. Since that rule is founded on the doctrine of separation of powers between the federal judiciary and the federal executive branch, it would obviously have no application where the involved executive agency was in the state rather than the federal government so that separation of federal powers would not be involved. 46 Harv. L. Rev. 478, 481-482 (1932). Moreover, the observation should be read as related to the facts before the Court.

Throughout its decision the Court stressed the peculiarly thorny technical problems presented, and the fact that in this situation the administrative body had much more competence than the courts. A proration order involves much more scientific and technical competence than the ordinary constitutional factual question presented in the *Ben Avon* case (39 Mich. L. Rev. 438, 447 (1941)), or presented here.[9]

It is not our position that a court should not give proper weight, in passing upon a constitutional issue, to the findings of an administrative body of experts upon technical matters; that, in its deliberations, it may not respect the "feel of the expert." But this is not to say that when a constitutional issue turns upon the determination of a question of fact, the fact question will not be reviewed if there is any evidence to support an administrative determination thereof. The court below, in expressly disclaiming the function of an "arbiter" of such facts, failed to perceive that it thereby abdicated its function as a guardian of rights conferred by the Constitution, since constitutional principles can never be enforced in a vacuum unrelated to facts.

It is significant also, as indicating that this Court did not reject this doctrine of independent judicial review in either *New York v. United States* or the *Rowan & Nichols* case, that the New York Court of Appeals said in 1947, after those decisions:

> "The *Ben Avon* case, supra, has never been overruled; on the contrary the principle that where consti-

9. All that is said here also applies to an earlier case, *Railroad Commn. of Texas v. Rowan & Nichols Oil Co.* (1940), 310 U.S. 573, which is cited by the Commission, and which involves the same questions.

tutional rights of liberty or property are involved due process requires independent judicial determination of the constitutional question in the courts has been reaffirmed."[10]

A further indication that this Court has not abandoned and should not abandon the rule of the *Ben Avon* case, stems from its recent reaffirmance of the doctrine that it will itself independently re-examine evidentiary facts when constitutional questions hinge upon the propriety of ultimate conclusions drawn from those evidentiary facts and will not be bound by the findings of state courts thereon. *Oyama v. California* (1948), 332 U.S. 633, 636, and cases cited; *Niemotko v. Maryland* (1951), 340 U.S. 268, 271; *Southern Pac. Co. v. Arizona, supra,* 325 U.S. 761. Since this Court is thus necessarily bound at the ultimate appellate stage to re-examine independently evidentiary facts to safeguard constitutional rights, it logically follows that, when the constitutionality of state administrative action is challenged on a factual ground, such as in the present case, there should also be such a re-examination under the *Ben Avon* rule at an earlier stage by a state court. This is in the interest of the parties, since otherwise they would never be able to secure any judicial determination of the constitutionality of the administrative action without appealing to this Court. It also is in the interests of efficient administration of justice, because it would eliminate some appeals to this Court, and would give this Court the benefit of the state court's preliminary performance of the same task of independently re-

10. *Staten Island Edison Corp. v. Maltbie* (1947), 296 N.Y. 374, 73 N.E. 2d 705, 707.

examining the evidence which it must, itself, ultimately perform.

It seems unthinkable that this Court would now depart from a rule so fundamental to American ideals of freedom from executive tyranny as the doctrine of independent judicial review of facts upon which constitutional rights depend. Essentially this doctrine is based on the theory that it would be a severe infringement of individual liberty for a legislative or administrative agency, which is engaged in laying down or enforcing the law, also to arrogate unto itself the final power to decide the very constitutional validity of its action. 32 Ill. L. Rev. 50, 53 (1937); 39 Mich. L. Rev. 438, 440 (1941). The necessity for this rule in order to protect constitutional rights is well explained by this Court in *St. Joseph Stock Yards Co. v. United States, supra*, 298 U.S. 38, 51-52:

> "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these [constitutional] limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation."

The danger inherent in rejecting this rule is just as apparent now as it was in 1931 to Chief Justice Hughes, when he said:

> "The power of administrative bodies to make findings of fact which may be treated as conclusive, if there

is evidence both ways is a power of enormous consequence. An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'" (New York Times, Feb. 13, 1931, p. 18; quoted in 46 Harv. L. Rev. 478, 490-491 (1933).)

For all of the reasons here stated, it is respectfully submitted that the motion to dismiss or affirm should be denied, and probable jurisdiction noted.

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Counsel for Appellant

Dated: November 25, 1953.

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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 486

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, VERNE SCOGGINS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 18667

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Petitioner-Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, VERNE SCOGGINS, KENNETH POTTER AND PETER E. MITCHELL, AS MEMBERS OF AND CONSTITUTING SAID COMMISSION,
Respondents-Appellees

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Public Utilities Commission of the State of California (hereinafter referred to as "Commission"), and R. E. Mittelstaedt, Justus F. Craemer, Kenneth Potter, Peter E. Mitchell and Verne Scoggins, as members of and constituting said Commission, respondents and appellees, for its statement in opposition to statement as to jurisdiction herein of Southern Pacific Company, petitioner and appellant (hereinafter referred to as "Southern Pacific"), and

in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of Facts

Southern Pacific is an intrastate and interstate common carrier of freight and passengers by railroad, motor vehicle and vessel.

The Commission is the duly constituted and acting authority of the State of California having regulatory jurisdiction over all public utilities, including railroads and other transportation companies. (Sections 17, 19-23a of Article XII of the Constitution of California; the Public Utilities Act, Statutes 1915, Chapter 91, as amended; and the Public Utilities Code, Statutes 1951, Chapter 764, as amended.)

Southern Pacific on April 15, 1950, filed an application with the Commission requesting authority to discontinue the operation of one midday passenger train in each direction between San Francisco and Oakland Pier on the one hand and Sacramento on the other, and intermediate points. The trains are known as "The Statesman" (Train No. 246) running eastward and "The Governor" (Train No. 229) running westward. The trains connect with a ferry-boat service between San Francisco and Oakland Pier. These trains furnish service between the large San Francisco Bay Area and the State Capitol, operating entirely within the boundaries of the State of California.

A hearing on said application filed by Southern Pacific was held by the Commission on July 6, 1950 and the matter submitted. The Commission on September 27, 1950 reopened the application proceeding for further hearing, and upon its own motion also ordered an investigation into the adequacy of the Southern Pacific passenger train service between various sections of the State, and particularly be-

tween San Francisco and Sacramento, and points intermediate thereto. The order of investigation extended to passenger train service other than the aforementioned, but such other service is not involved in the present proceeding now before the Court. The authority of the Commission to institute such an investigation upon its own motion is derived from Sections 705 and 1702 of the Public Utilities Code. The Southern Pacific's application and the Commission's investigation were thereupon consolidated, and two public hearings were held on August 26, 1951 and September 20, 1951.

The Commission then made its opinion and issued its order by Decision No. 47161 dated May 13, 1952 (51 Cal. P. U. C. 711), and acting upon Southern Pacific's petition for rehearing issued Decision No. 47276, on June 17, 1952. The Commission orders required that Southern Pacific discontinue the two midday passenger trains in question "by the use of steam locomotive and standard railway passenger equipment and shall substitute in lieu thereof railway passenger service by modern, self-propelled railway passenger cars". Further, that two other trains of Southern Pacific ("The Senator" and "The El Dorado") be refurbished to a standard comparable to modern railway passenger equipment," and that Southern Pacific "make a study and prepare and submit to the Commission a plan for the establishment of automotive passenger service between San Francisco and its East Bay stations in Oakland and Berkeley to be operated in conjunction with its railway passenger train service"; and "make a study and prepare and submit to the Commission a comprehensive plan for modernization of its Oakland Pier passenger terminal facilities." These latter two matters merely require Southern Pacific to make studies, hence they were preliminary matters and not final orders of the Commission. Decision No. 47276, ruling upon Southern Pacific's petition for

rehearing, modified said Decision No. 47161, finding that public convenience and necessity require continuance of the midday trains and that "the service, equipment and facilities, now being furnished, used and employed, are inadequate and insufficient."; that an improvement in service is required; that the Southern Pacific had not discharged its public duty in that it failed to provide improvements in service required, having the ability so to do, and the improvements required would not constitute an undue financial or other burden.

The statutory authority of the Commission conferred upon it by the state legislature is to be found in the Public Utilities Code, Sections 730, 761, 762, 763. These statutory provisions are as follows:

> "730. The commission shall, upon a hearing, determine the kind and character of facilities and the extent of the operation thereof, necessary reasonably and adequately to meet public requirements for service furnished by common carriers between any two or more points, and shall fix and determine the just, reasonable, and sufficient rates for such service. Whenever two or more common carriers are furnishing service in competition with each other, the commission may, after hearing, when necessary for the preservation of adequate service and when public interest demands, prescribe uniform rates, classifications, rules, and practices to be charged, collected, and observed by all such common carriers.
>
> "761. Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed,

enforced, or employed. The Commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

"762. Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any apparatus, facilties, or other physical property of any ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured.

"763. Whenever the commission, after a hearing, finds that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation

to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

The Commission's aforementioned decisions have been affirmed and upheld in their entirety by the Supreme Court of the State of California in the matter of *Southern Pacific Company* v. *Public Utilities Commission of the State of California, et al.* (S. F. No. 18667), 41 A. C. 362, 260 P. 2d 70, the decision which is now being appealed to this Honorable Court.

II. Statement of Issues on Appeal

Southern Pacific contends that the continued operation of the trains in question with self-propelled equipment will: (1) be an undue burden upon its interstate commerce, (2) a denial of due process of law, and (3) the California statutory procedure for judicial review of orders of the Commission is a violation of the Due Process clause.

The trains in question operate entirely in intrastate commerce and at no time has Southern Pacific contended that its intrastate operations as a whole are operating at a loss.

Does the Commission, therefore, have the power and authority to order the continued operation of these intrastate trains and further require the employment of self-propelled cars?

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Petitioner has cited a number of decisions from other jurisdictions where a railroad was permitted to abandon service because such service was not compensatory. There is no question but that the Commission, lawfully, could have granted petitioner's request for abandonment but it was not required to do so. Furthermore, cases cited from other jurisdictions are certainly not controlling and are of little help because they, for the most part, are based upon dissimilar statutory provisions and, in any event, are not binding upon the Public Utilities Commission of this State or upon this Court. In the case of *San Diego, etc., Ferry Company* v. *Railroad Commission*, 210 Cal. 504, at page 511, the Supreme Court of California has pointed out that cases cited from other jurisdictions are of very little help in construing the powers of the Public Utilities Commission of this State under the broad and pervasive constitutional and statutory provisions applicable:

> "Cases cited from other states expounding theories of regulated monopoly or restricted competition under particular statutes are likewise not helpful in defining the powers of the respondent Commission and of this court under our law."

Appellant contends that it is being deprived of its property without due process in that it is being required by appellees to discontinue the operation of two steam passenger trains and to replace them with two pieces of modern, self-propelled equipment, the keystone of its objection being that there is no public need for either type of operation. Of course, it is elementary that a State may require the continuation of railroad service at a financial loss and that such requirement raises no issue under the Federal Con-

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stitution. (*Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, 347, 352-353, 95 L. Ed. 1002, 1007, 1010.) The rule has been consistently followed by this Court in *Missouri Pac. Ry. Co.* v. *Kansas*, 216 U. S. 262, 277-280, 54 L. Ed. 472, 478-480; *Atlantic Coast Line R. Co.* v. *North Carolina*, 206 U. S. 1, 23-27, 51 L. Ed. 933, 943-945; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 308-309, 73 L. Ed. 390, 396; and in many cases cited by Mr. Justice Frankfurter in his concurring opinion in the *Alabama Public Service Commission* case, *supra*, at pages 352-353 of the U. S. Report.

As appellees were and are concerned with the public interest and the system service as a whole in California, let us first consider, in the light of the system service, whether apellant will be "deprived" of any substantial "property" by compliance with appellees' order.

The appellant's equipment ordered to be replaced was found to be "old, outmoded and outdated"; that it had been relegated to the service when it became outmoded and uneconomical in the service where it was originally used. The cost of modern, self-propelled vehicles has been estimated at $150,000 for each car with approximately three cars being sufficient.

Monthly operating reports of revenues and expenses of appellant filed with appellees show system net railway operating income of $45,381,528 after allowance for taxes and rents for the year 1951. By supplanting the two steam trains with modern, self-propelled vehicles, found to be the cheapest practicable equipment, the annual operating loss of the two trains would be reduced to $19,000. Such a loss is so insubstantial, in view of appellants' net income, as to present no deprivation of property important enough for the consideration of this Court. No showing was made by appellant that by the small and insubstantial loss to be in-

curred in complying with the Commission's decision, Southern Pacific Company would be deprived of that protection for its investment which alone can be made the basis of a claim under the due process clause of the Fourteenth Amendment. Further, Southern Pacific has never at any time claimed that its intrastate operation in California is operating at a loss or confiscatory.

Next is the question of public need for the service. Appellant claims that there is none, despite the fact that the operation in question is between the State Capitol and one of the largest metropolitan areas in the second largest State in the Union, and operating through communities which have increased their population by 50% in the last ten years. This statement comes with exceedingly poor grace from a carrier which will not furnish modern or up-to-date passenger service between such terminals until compelled to do so by the Commission. By the process of degrading its service, it has rendered it so unattractive to the public to reach the point of driving it to other modes of transportation. Certainly it does not lie within the rules of law or equity to permit a public utility to profit by its own inattention to its duty.

Appellant further contends that the record shows no need for continuance of the operation of the service, since there is evidence of operation of other trains, service by bus and airplane and use of the highway by private transportation. It was for *appellees* to conclude whether or not, despite availability at times of other means of transportation, there existed a continuing need of public convenience and necessity for the service in question. The Commission found that there exists such a need, which is a matter peculiarly within its jurisdiction. The record contains sufficient evidence to amply support the findings of the Commission. Also the Commission may draw upon its experience and informed

judgment in arriving at its decision. For a regulatory body to do so does not constitute its basing its decision on matters outside of the record.

> *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 560-563, 89 L. Ed. 1171, 1181-1182; 24 Cal. (2d) 378, 150 P. 8d 196.

Also, a regulatory body is not required to blind itself to obvious facts in arriving at its decision, although it might be said that, to some extent, in so doing it goes outside the record.

> *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 529-531, 90 L. Ed. 821, 831-833.

This Court has held that regulation of intrastate railroad services is "primarily the concern of the state."

> *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates);
> *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service);
> *Alabama Pub. Serv. Com.* v. *Southern Ry. Co., supra.*

> "The problems raised by the discontinuance of trains 7 and 8 cannot be resolved alone by reference to appellee's loss of their operation but depend more upon the predominantly local factor of public need for the service rendered."
>
> *Chesapeake & Ohio R. Co.* v. *Public Service Com. of West Virginia*, 242 U. S. 603, 608, 61 L. Ed. 520, 523, 37 S. Ct. 234 (1917).

The Supreme Court of the State of California, a body necessarily familiar with local problems, reviewing the factual basis for the Commission's findings, stated:

> "This Court will not attempt to resolve conflicts in the evidence on the question of public convenience and necessity nor substitute its judgment for that of the

commission on a subject so peculiarly within its jurisdiction and *justifiably based on the record before it.*" (Emphasis supplied.)

To carry the contention of appellant to its logical conclusion, this Commission should permit the abandonment of *all* of appellant's intrastate passenger service, save only that small portion of it which, the record shows, earns its out-of-pocket costs, and permit it to continue to skim the cream of its lucrative freight transportation, because there is other passenger transportation available in the State, and the public, having become so exasperated with appellant's service, has taken enthusiastically to the use of automobiles.

The Commission does not so construe its duty to the people of this great and growing State, nor will it permit a utility to enjoy privileges while evading its duties. Performance of duty cannot be avoided merely because it is attended by some insubstantial pecuniary loss.

Chesapeake & Ohio R. Co. v. *Public Service Com. of West Virginia*, 242 U. S. 603, 61 L. Ed. 520, and cases therein cited.

It must ever be kept in mind that a public utility is performing a function of the State (*Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819), and that a public utility exercises an extraordinary privilege and occupies a privileged position and is not free to pick and choose the part or portion of the service it desires to render. The fact that part of its operations may not be remunerative is not controlling in such case.

United Fuel Gas Co. v. *Railroad Commission*, 278 U. S. 300, 308-309, 73 L. Ed. 390, 396.

IV. The Decisions Create No Burden on Interstate Commerce

It is difficult to conceive how the Commission's decisions herein or the decision of the California Supreme Court in any manner place a burden upon interstate commerce as Southern Pacific contends or that the National Transportation Policy is in any way contravened.

To briefly comment upon some of the authorities cited by Southern Pacific, in the case of *California* v. *Zook* (1949), 336 U. S. 725, 729, 93 L. Ed. 1005, the National Transportation Policy was not mentioned. The Court sought out the national policy, as expressed in the commerce clause, in determining that there was no conflict between a section of the Federal Motor Carrier Act and a California statute. The California statute was upheld on the ground of local interest notwithstanding that the statute was a direct regulation of interstate commerce regarding a matter on which Congress had spoken.

In *Southern Pacific Co.* v. *Arizona* (1945), 325 U. S. 761, 89 L. Ed. 1915, the Arizona Train Limit Law limited the number of cars in *interstate* freight and passenger trains, and hence was a direct regulation of interstate commerce. It was held void as to interstate commerce on the ground that varying maximums of cars required by different states, through which trains would pass, would invade a field where uniformity of regulation would be a national need if any such maximum was to be validly prescribed. The statute, though enacted as a safety measure, tended to increase the number of accidents and made it necessary for the railroads to break up trains into shorter ones before entering the state. The required changes increased the operating expenses of the two railroads operating interstate in Arizona by $1,000,000 a year. This effect is to be contrasted with an estimated reduction of appellant's annual operat-

ing expenses from $105,000 to $19,000 through substitution of self-propelled cars.

In the instant case, based upon ample evidence, the California Commission found:

> "That Southern Pacific Company has attempted to maintain the service with outmoded equipment which was relegated to the service when it became outmoded and uneconomical in the service where it was originally used. The record is quite clear that the company has made but a minimum attempt to modernize its equipment and has failed to bring its service up-to-date between those points. The only effort that has been made in rehabilitating this equipment has been the air-conditioning and painting of old, outmoded and outdated cars." (51 Cal. P. U. C. 711, 718)

In substance, the findings of the Commission are that the service is inadequate, uneconomical and inefficient. Further findings of similar tenor, though more explicit, are contained in Commission Decision No. 47276, denying Southern Pacific's petition for rehearing, and are set forth in appellees' Statement of Facts.

Obviously, the type of service to be rendered by one railroad between designated points in California is not a subject feasible of regulation by a rule uniform as to all the states.

In *Davis* v. *Farmers Co-operative Co.* (1923), 262 U. S. 312, 67 L. Ed. 996, the state statute voided by the Court was held to be a direct regulation of a matter of interstate commerce, because it compelled every foreign interstate carrier to submit to suit in the state as a condition of maintaining a soliciting agent within the state, notwithstanding that the suit did not arise out of business transacted within Minnesota or that the plaintiff was a non-resident. It was held therein that the condition unreasonably obstructed and unduly burdened interstate commerce. From the Court's opinion appellant quotes language beginning "This common

interest, etc." However, appellant omits the immediately preceding sentence, of vital importance to the quotation, which reads: "The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost."

In *King* v. *United States* (1952), 344 U. S. 254, 97 L. Ed. Adv. p. 207, the Court held that the Interstate Commerce Commission, in prescribing intrastate freight rates for railroads under Section 13(4) of the Interstate Commerce Act empowering the Commission to prescribe intrastate rates to remove undue, unreasonable or unjust discrimination against interstate commerce, may give weight to deficits in passenger revenue. Appellees take no issue with the case.

Colorado v. *United States* (1926), 271 U. S. 153, 70 L. Ed. 878, upheld the power of the Interstate Commerce Commission to determine that public convenience and necessity permit abandonment in interstate commerce of a railroad branch line situated wholly within the state. The case now before the Court does not concern abandonment of any rail line, but rather intrastate train service.

Atlantic Coast Line R. Co. v. *Wharton* (1907), 207 U. S. 328, 52 L. Ed. 230; *Chicago, B. & O. R. R. Co.* v. *Railroad Comm. of Wisconsin* (1915), 237 U. S. 220, 59 L. Ed. 926; and *St. Louis & S. F. R. Co.* v. *Public Service Comm.* (1921), 254 U. S. 535, 65 L. Ed. 389, all are concerned with unreasonable state action directly regulating interstate commerce, i.e., requiring stops by interstate trains.

It is respectfully submitted that the enactment in 1940 by Congress of the declaration of the National Transportation Policy does not create anything new or novel as to the question whether this case places an undue burden on interstate commerce or furnish an element of substantiality to the Federal question. Going once again to the case of *Alabama Public Service Commission* v. *Southern Ry. Co.*,

341 U. S. 341, 345-346, 95 L. Ed. 1002, 1006-1007, this Court said in regard to the Interstate Commerce Act:

> "But it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. Minnesota Rate Cases *(Simpson* v. *Shepard)* 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729, 48 LRA NS 1151, Ann Cas 1916A 18 (1913). And Congress has since provided:
>
> "That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission].' 49 USC § 1 (17(a)).
>
> "This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.' *North Carolina* v. *United States,* 325 U. S. 507, 511, 89 L. Ed. 1760, 1765, 65 S. Ct. 1260 (1945) (rates); *Palmer* v. *Massachusetts,* 308 U. S. 79, 84 L. Ed. 93, 60 S. Ct. 34 (1939) (discontinuance of local service)."

The superseding of state authority will be declared only where there is no possible doubt as to the clear intent of Congress to supersede the state authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary in order to protect the national interests which it, can hardly be claimed, is so affected by the Commission decisions herein.

Palmer v. *Massachusetts,* 308 U. S. 79, 82-85, 84 L. Ed. 93, 96-99;
Yonkers v. *United States,* 320 U. S. 685, 690-691, 88 L. Ed. 400, 403-405;
North Carolina v. *United States,* 325 U. S. 507, 511, 89 L. Ed. 1760, 1765.

Also, any doubt that may exist as to the superseding of state jurisdiction must be resolved in favor of state authority.

Arkansas R. R. Commission v. *Chicago, Rock Island & Pac. R. R. Co.*, 274 U. S. 597, 603, 71 L. Ed. 1224, 1228.

As heretofore pointed out, in the absence of Federal occupation of the field, it is a fundamental rule that a state has the authority to regulate and even burden interstate commerce of a local nature, provided the state does not discriminate against such commerce.

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. Ed. 993, 998;

So. Carolina State Hy. Dept. v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. Ed. 734, 741.

In the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 186, 95 L. Ed. 190, 202, the Court well states the rule as follows:

"The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley* v. *Port Wardens* (U. S.) 12 How. 299, 13 L. Ed. 996 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker* v. *Brown*, 317 U. S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 83 L. Ed. 752, 59 S. Ct. 528 (1939); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state in-

terest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions."

In the light of the foregoing authority, it is submitted that the decisions herein involved do not in any manner create a burden upon interstate commerce, much less discriminate against it.

V. No Deprivation of Due Process Because of Limitation of Scope of Review

Appellant contends that the California procedure for statutory review of orders of the Commission is a violation of the Due Process Clause. Since appellant has quoted the pertinent sections of the Public Utilities Code in its brief (Secs. 1756-1760), appellees will not burden the Court by their repetition.

Appellant relies heavily upon the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, 64 L. Ed. 908, 914, which contains strong dissenting opinions by Justices Brandeis, Holmes and Clarke. While it has never been expressly overruled, it has been eroded and devitalized by the Courts themselves, disinclined to try regulatory proceedings *de novo*, in the cases of *Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-582, 584, 84 L. Ed. 1368; *New York* v. *United States*, 331 U. S. 284, 334-336, 91 L. Ed. 1492, 1528-1530; and finally rejected by *Alabama Public Service Com.* v. *Southern Ry. Co.*, *supra*, in the following language:

> "The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is

now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

VI. Conclusion and Motion to Dismiss or Affirm

It is respectfully submitted that the questions presented in this appeal have been so definitely determined that no substantial Federal questions are presented by the appeal entitling Southern Pacific to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, respondents and appellees respectfully move that the within appeal be dismissed, or that the judgment and decree of the Supreme Court of the State of California affirming the decisions and orders of the Commission be affirmed.

Dated, San Francisco, California, November 5th, 1953.

Respectfully submitted,

EVERETT C. MCKEAGE,
RODERICK B. CASSIDY,
HAROLD J. MCCARTHY,
MARY MORAN PAJALICH.

No. 486. SOUTHERN PACIFIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *George L. Buland, Evan J. Foulds, James E. Lyons, Robert L. Pierce* and *Charles W. Burkett, Jr.* for appellant. *Everett C. McKeage* for appellees. Reported below: 41 Cal. 2d 354, 260 P. 2d 70.